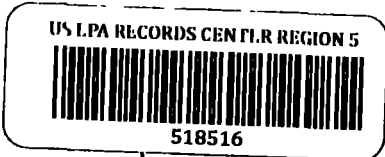


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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION



UNITED STATES OF AMERICA,

Plaintiff,

vs.

)
)
) Civil Action
) No. H-79-556
) Third-Party
) Complaint

MIDWEST SOLVENT RECOVERY INC.;
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & E CORPORATION; ERNEST DE
HART; EDUARD D. CONLEY; HELGA C.
CONLEY; LOVIE DE HART; CHARLES A.
LICHT; DAVID E. LICHT; DELORES LICHT;
EUGENE KLISIAK; JEANETTE KLISIAK;
LUTHER G. BLOOMBERG; ROBERT J. DAW-
SON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
and DESOTO, INC.;

Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,

1 AMERICAN PRINTER & LITHOGRAPHER CO.,)
 AMERICAN RIVET COMPANY, APECO,)
 2 APPROVED INDUSTRIAL REMOVAL, INC.,)
 ARMOUR PHARMACEUTICAL, ARTISAN HAND)
 3 PRINTS, ASHLAND CHEMICAL CO.,)
 AVENUE TOWING COMPANY, BARR &)
 4 MILLS, INC., BELDEN ELECTRICAL)
 PRODUCTS DIV. OF COOPER INDUSTRIES,)
 5 INC., BRETFORD MANUFACTURING, INC.,)
 BUTLER SPECIALTY COMPANY, INC.,)
 6 BY PRODUCTS MANAGEMENT, CALUMET)
 CONTAINER, CARGILL, INC.,)
 7 CHEMALLOY DIVISION OF FISHER- CALO)
 CHEMICAL CO., CHICAGO ETCHING CORP.,)
 8 CHICAGO NAMEPLATE COMPANY,)
 CHICAGO ROTOPRINT CO.,)
 9 C & C INDUSTRIAL MAINTENANCE CORP.,)
 CITY OF GARY, INDIANA, C.P. CLARE)
 10 DIVISION OF GENERAL INSTRUMENTS)
 CORP., C.P. HALL CO.,)
 11 C.P. INORGANICS, COMMANDER PACKAGING,)
 CONNOR FOREST INDUSTRIES, CONSERVA-)
 12 TION CHEMICAL, CONSUMERS PAINT)
 FACTORY, INC., CONTINENTAL)
 13 WHITE CAP DIVISION OF CONTINENTAL)
 CAN COMPANY, CONVERSIONS BY GERRING,)
 14 COUNTY OF DU PAGE, ILLINOIS,)
 CRONAME, INC., CROWN CORK & SEAL)
 15 CO., INC., CULLIGAN INTERNATIONAL)
 COMPANY, CULLIGAN WATER CON-)
 16 DITIONING, INC., FRANK J. CURRAN,)
 CUSTOM METALS PROCESSING,)
 17 DAP, INC. OF BEECHAM COSMETICS,)
 DAUBERT CHEMICAL COMPANY,)
 18 DEUBLIN COMPANY, DOBSON CONSTRUCTION)
 INC., DUO FAST CORPORATION, DU-TONE)
 19 CORP., HAROLD EGAN, ERCO HOUSEWARE)
 CO., EL-PAC, INC., EMBOSOGRAPH DIS-)
 20 PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
 ETHICON, INC., FELT PRODUCTS MFG. CO.,)
 21 FLINT INK CORP., FURNAS ELECTRIC)
 CO., GEARMASTER DIVISION, EMERSON)
 22 ELECTRIC, THE GILBERT & BENNETT)
 MFG. CO., GLD LIQUID DISPOSAL,)
 23 HENRY PRATT COMPANY, J.M. HUBER)
 CORPORATION, HYDRITE CHEMICAL CO.,)
 24 INTAGLIO CYLINDER SERVICE, INC.,)

1 JOHNSON & JOHNSON, J & S TIN MILL)
 PRODUCTS, KNAACK MFG. CO., LANSING)
 2 SERVICE CORPORATION, LAUTTER)
 CHEMICAL, LIQUID DYNAMICS,)
 3 LIQUID WASTE, INCORPORATED,)
 STEVE MARTEL, MASONITE CORPO-)
 4 RATION, McWHARTER CHEMICAL CO.,)
 METAL RECLAIMING CORPORATION,)
 5 METROPOLITAN CIRCUITS,)
 MIDWEST RECYCLING COMPANY, MONTGOMERY)
 6 TANK LINES, MORTON THIOKOL INC.,)
 MR. FRANK, INC., NAMSCO, INC.,)
 7 NATIONAL CAN CORPORATION, NAZ-DAP CO.,)
 NUCLEAR DATA, INC., PPG INDUSTRIES,)
 8 INC., PASLODE COMPANY, PIERCE & STEVENS)
 CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
 9 PREMIER PAINT CO., PYLE-NATIONAL CO.,)
 R-LITE, REFLECTOR HARDWARE CORP.,)
 10 REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
 RICHARDSON GRAPHICS, JOHN ROSCO,)
 11 ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
 MANUFACTURING, SCHOLLE CORPORATION,)
 12 SCRAP HAULERS, SHERWIN WILLIAMS)
 COMPANY, SIELD COATINGS, INC.,)
 13 SIZE CONTROL COMPANY, SKIL CORPORA-)
 TION, SPECIAL COATINGS CO.,)
 14 SOUTHERN CALIFORNIA CHEMICAL,)
 SPECIALTY COATINGS, INC.,)
 15 SPOTNAILS, INC., STAR TRUCKING, STERN)
 ELECTRONICS, INC., JOE STRAUSNICK,)
 16 STUART CHEMICAL & PLANT, INC.,)
 SUMMER & MACE, SUN CHEMICAL,)
 17 SYNTech WASTE TREATMENT CENTER,)
 T.R.C., TEEPACK, INC., ALFRED TENNY,)
 18 THIELE-ENGDAHL, INC., THOMPSON)
 CHEMICALS, TIFFT CHEMICALS,)
 19 TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
 UNIROYAL, INC., UNITED RESIN AD-)
 20 HESIVES, INC., U.S. ENVELOPE, U.S.)
 SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
 21 VERSAL RESEARCH LABORATORIES, INC.,)
 UNIVERSAL TOOL & STAMPING COMPANY,)
 22 VANDER MOULEN DISPOSAL, VELSICOL)
 CHEMICAL CORP., VICTOR GASKET)
 23 DIVISION OF DANA CORPORATION,)
 WARNER ELECTRIC BRAKE & CLUCH CO.,)
 24 WARWICK CHEMICAL, WASTE RESEARCH &)

1 RECYCLING, XEROX CORPORATION, and)
2 other unidentified persons,)

3 Third-Party Defendants.)
4
5
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7

8 DEPOSITION OF
9 RICHARD E. BOICE

10 June 5, 1990
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The deposition of RICHARD EDWIN BOICE,
called for examination by the Defendants, pursuant
to notice and pursuant to the provisions of the
Federal Rules of Civil Procedure of the United
States District Courts, pertaining to the taking
of depositions for the purpose of discovery, taken
before Arnold N. Goldstine, a Notary Public and
Certified Shorthand Reporter within and for the
County of Cook and State of Illinois, at 227 West
Monroe Street, on June 6, 1990, commencing at the
hour of 9:30 o'clock a.m.

APPEARANCES:

Mr. Alan S. Tenenbaum
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-and-

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-and-

Peter W. Moore
Assistant Regional Counsel
U.S. Environmental Protection Agency
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Office of Regional Counsel
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appeared on behalf of Plaintiff,
United States of America;

Ms. Anne M. Beckert
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appeared on behalf of Ashland
Chemical Company;

APPEARANCES (CONTINUED):

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appeared on behalf of
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Mr. William G. Dickett
Sidley & Austin
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appeared on behalf of
Pre Finish Metals, Inc.;

Mr. Jeffrey C. Fort and
Ms. Lisa Anderson
Gardner, Carton & Douglas
Quacker Tower
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appeared on behalf of
Desoto, Inc.;

Mr. Michael O. Hill
Covington & Burling
1201 Pennsylvania Avenue , N.W.
Washington, D.C. 20004

appeared on behalf of
Insilco Corporation;

Mr. Joseph V. Karaganis
Karaganis & White, Ltd.
414 North Orleans Street
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appeared on behalf of
American Can Company, Inc.;

1
2 APPEARANCES (CONTINUED):3
4 Mr. James T. J. Keating
5 Law Offices of James T. J. Keating, P.C.
6 Printers Row
7 542 South Dearborn Street
8 Chicago, Illinois 606059
10 appeared on behalf of
11 Premier Coatings, Inc.;12
13 Mr. Edward J. Leahy
14 Leahy, Eisenberg & Fraenkel, Ltd.
15 309 West Washington Street
16 Chicago, Illinois 6060617
18 appeared on behalf of
19 Scholle Corp.;20
21 Mr. Ralph W.F. Lustgarten
22 Taylor, Miller, Sprowl, Hoffnagle &
23 Merletti
24 33 North LaSalle Street
Chicago, Illinois 60602-2602appeared on behalf of Third-
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Stults, Custer & Kutansky
3637 Grant Street
P. O. Box 15050
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John & Mary Miletich;Mr. Harvey M. Sheldon
McDermott, Will & Emery
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Chicago, Illinois 60606-5096

-and-

APPEARANCES (CONTINUED):

Mr. James J. Kupka
Senior Attorney
Montgomery Ward & Co., Incorporated
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Chicago, Illinois 60671

appeared on behalf of
Standard T Chemical Co.;

Mr. Richard S. VanRheenen
Cromer, Eaglesfield & Maher, P.A.
Station Place
200 South Meridian Street
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appeared on behalf of
J & S Tin Mill Products Company,
Inc., et al.;

Mr. Bradley L. Williams
Ice, Miller, Donadio & Ryan
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Indianapolis, Indiana 46282

appeared on behalf of
Indiana Department of Highways.

I N D E X

WITNESS:

Page:

Direct Examination

By Mr. Fort

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Continued

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By Mr. Karaganis

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Continued

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E X H I B I T S

Boice Deposition Nos.

1

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3 through 5

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1 MR. FORT: Would you swear the witness,
2 please.

3 (Witness sworn.)

4 RICHARD EDWIN BOICE

5 having been first duly sworn,
6 was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. FORT:

9 Q. Would you state your name, please?

10 A. Richard Edwin Boice.

11 Q. And by whom are you employed, sir?

12 A. The US Environmental Protection
13 Agency.

14 Q. Let the record show that the is the
15 deposition of Mr. Richard E. Boice taken
16 pursuant to notice and continued to the present
17 day by agreement of the parties.

18 Mr. Tenenbaum, I am here on behalf of
19 Desoto, one of the defendants in this matter,
20 and we have put a Rule 30 (b) 6 deposition out
21 for the government to respond to.

22 I know you have had discussions with
23 some of my colleagues. I take it that Mr.
24 Boice is the deponent for purposes of Desoto's

1 Rule 30 (b) 6 notice?

2 MR. TENENBAUM: Well, we received a number
3 of notices in this case, I think about five of
4 them, for 30 (b) 6 notices, as well as -- I
5 guess maybe six 30 (b) 6 notices and a notice
6 of Mr. Boice by name.

7 A lot of the notices do overlap. It
8 is your deposition, so you I guess can decide
9 the order you want to take them in.

10 Our suggestion would be that the
11 deposition of Richard Boice personally go
12 first. But, you certainly don't have to do it
13 the way that we would suggest.

14 We think that would be the most
15 efficient way to proceed. Since that way, if
16 he has already answered various questions on 30
17 (b) 6 designations, you have already covered
18 that. Otherwise, we are going to be
19 overlapping and duplicating ourselves.

20 But if that is the way you want to
21 proceed, that's up to you.

22 MR. FORT: I am not sure I understood all
23 that.

24 But, I take it that Mr. Boice may not

1 be the only person that would then be
2 responsive to Desoto's Rule 30 (b) 6 notice?

3 MR. TENENBAUM: Let me provide you for the
4 record a copy of our objections to the various
5 Rule 30 (b) 6 designation requests and document
6 requests and notices, which is a combined
7 response to the various notices.

8 I will ask the reporter to mark it as
9 an exhibit. I don't know what label we want to
10 put on it.

11 MR. FORT: This is a document that you are
12 serving on us at this moment?

13 MR. TENENBAUM: Yes, it is.

14 MR. KARAGANIS: This is Joseph Karaqanis.

15 For the record, the 30 (b) 6 notices
16 and the individual notices to Mr. Poice have
17 been outstanding for several weeks.

18 I believe some of the notices predate
19 May, and I know on behalf of American National
20 Can, our notice went out May the 8th.

21 We are now just on the morning of the
22 deposition receiving their objections. I think
23 that this is a highly prejudicial practice and
24 I strongly object to it.

1 From the standpoint of recording the
2 pleading, I don't think it is necessary to
3 record the pleading filed by the government
4 today, I presume as an exhibit to the
5 deposition. It will be an official record with
6 the court.

7 MR. TENENBAUM: Let me respond first of all
8 by saying that there is nothing in these
9 objections that should come as a surprise to
10 anybody.

11 I have been discussing our position on
12 these matters with the various counsel, many
13 times during the last three weeks in which
14 these notices have been pending. And I have
15 made our position very clear on what we are
16 going to do.

17 And I don't think it should come as a
18 surprise to anybody, we filed our motion for
19 protective order last week, which is
20 cross-referenced in our objections, and I will
21 also ask the reporter to mark that as an
22 exhibit as well.

23 Shall we call them Plaintiff's
24 Exhibits 1 and 2 or some other designation?

1 MR. FORT: I don't know why we are marking
2 all of your objections that are directed to the
3 court as exhibits here.

4 As Mr. Karaganis said, they are noted.
5 They will be filed at an appropriate time.

6 The purpose here is to by agreement --
7 and that agreement was reached between various
8 of the original defendants and the
9 government -- to continue depositions that had
10 been scheduled.

11 As Mr. Karaganis indicated, I believe
12 there were depositions of Mr. Boice scheduled
13 as early as the winter, and continued and
14 specific dates set in May by Mr. Karaganis, by
15 ourselves, and continued until today by
16 agreement.

17 Now, I think when it is your turn to
18 ask questions of the witness, you can mark
19 whatever exhibits you think need to be marked
20 in order to clarify his testimony.

21 But, I would like to know for purposes
22 of the facts that are sought by our Rule 30 (b)
23 6 notice in what areas Mr. Boice is being
24 designated as a witness.

1 MR. TENENBAUM: Let me first respond by
2 noting that the stipulation that rescheduled
3 these various deposition, numerous deposition
4 notices, made very clear that all rights for
5 motions for protective order, motions to compel
6 and so forth were reserved.

7 And that was made very clear in the
8 discussions with counsel.

9 We are not preventing the deposition
10 from moving forward today. We are just making
11 clear for the record our position, as we have
12 made clear to all counsel that we have talked
13 to about this.

14 And I think it would be a strange way
15 to proceed for us to go through your various
16 deposition categories and not have our --

17 I could read our objections into the
18 record, if we are going to be talking about the
19 objections.

20 MR. KARAGANIS: To move it along, if he
21 wants to identify them as government deposition
22 exhibits, let him do it and we will move along.

23 MR. FORT: Let's do it to get it on the
24 record. Let's move it along. Let's mark as

1 Exhibit No. 1, Boice Deposition Number 1 the
2 notice of deposition that was filed by Desoto
3 received by the court on May 14, 1990.

4 (The document above-referred to
5 was marked Boice Deposition
6 Exhibit No. 1 for identification.)

7 MR. KARAGANIS: Mr. Tenenbaum, do you have
8 the courtesy of copies of the objections that
9 you are filing this morning for counsel?

10 MR. TENENBAUM: I have an extra copy here.
11 We can make more copies.

12 I had trouble getting the record here.
13 I certainly couldn't make have voluminous
14 copies.

15 MR. SHELDON: For the record, my name is
16 Harvey Sheldon. I am here on behalf of
17 defendant Standard T Chemical Company.

18 As you know, I think my client gave
19 the first notice of deposition of Mr. Roice, I
20 forget the exact day, but it was either
21 December or January of this year. And, by
22 agreement, it was put off for a while.

23 I understood at that time from you
24 that you might wish to file protective order

1 motions. But, of course, it was not until
2 Monday morning that I first saw or received a
3 motion for a protective order from you.

4 Our deposition on behalf of Standard T
5 is for Richard Boice in person. We believe he
6 was a material official of the USEPA throughout
7 the course of the development of the Midco
8 decision, and its negotiation and aftermath.

9 Do your exhibits which you filed today
10 apply to my client's notice of deposition, sir?

11 MR. TENENBAUM: Your notice of deposition
12 was originally filed in December or January, I
13 think as you stated, and was indefinitely
14 postponed until rescheduled sometime last
15 month.

16 Our objections are to the combined --
17 all the notices, including yours. The first
18 paragraph of our objections does include a
19 reference to yours. And there are general
20 objections that are applicable to all of the
21 notices.

22 Since your notice was not a 30 (b) 6
23 notice, there is not an additional listing of
24 specific objections that would apply to your

1 notice.

2 MR. SHELDON: So do your documents apply to
3 my notice of deposition or not? Yes or no.

4 MR. TENENBAUM: It does apply. But, you
5 will not find a separate listing of specific
6 objections.

7 The general objections are identified
8 as applying to your notice.

9 MR. SHELDON: Then I would like a copy of
10 your documents and I would like to review them
11 before I state anything further on the record.

12 I will be happy to take a little break
13 here since it is my office and make our
14 photocopy machines available.

15 MR. TENENBAUM: Thank you.

16 MR. FORT: I would like to request that we
17 mark these objections as Exhibit No. 2, since
18 none of the defense counsel to which this
19 objection is raised have had an opportunity to
20 review it.

21 I would like to mark it and we will
22 proceed and we can review it, and if there is a
23 need to comment further on it, we will do that
24 later.

1 MR. KARAGANIS: I would like the record to
2 further show that as a result of Mr.
3 Tenenbaum's failure to file this thing until
4 this morning or serve it, we have approximately
5 twenty lawyers sitting here at a table, taking
6 a break in a very, very expensive deposition,
7 while we go out and get copies of material that
8 should have been timely filed weeks ago.

9 I think when the appropriate time
10 comes to review the tardiness of counsel in
11 filing these kinds of pleadings, the costs that
12 have been incurred by the parties should be
13 considered by the court.

14 MR. TENENBAUM: I would take strong
15 exception to those remarks.

16 The materials, as you will see in
17 these papers, are the same as in the papers we
18 filed with the court. They are the same as we
19 have been discussing with you for weeks and
20 months. They come as no surprise to anybody.
21 You knew the positions we were going to be
22 taking at these depositions.

23 And I really would take very strong
24 exception to those remarks. We are not

1 preventing the depositions from going forward.

2 MR. KARAGANIS: We are suspending them
3 while we will get zeros copies.

4 MR. TENENBAUM: Any of the attorneys here
5 would have been able to attend anyway. The
6 depositions are going forward. We are not
7 instructing the witness not to answer every
8 question that may be asked.

9 We made our position clear to any
10 attorney that talked to us over the course of
11 the last few weeks and months. And I think it
12 would be beneficial to all of us if we could
13 avoid this kind of rhetorical argumentation and
14 just proceed with the deposition.

15 MR. KARAGANIS: Let the record show we are
16 now going into recess while we copy the
17 government's pleading.

18 (Whereupon a short recess was taken.)

19 MR. FORT: Back on the record.

20 We have had an opportunity to get
21 copies made of the government's objections to
22 the Rule 30 (b) 6 depositions. And I don't
23 have my own copy yet, but we are going to
24 proceed anyway, because none of us have had a

1 chance to spend any time reviewing that.

2 Mr. Tenenbaum, is this witness being
3 offered for purposes of information of any of
4 the categories contained in the Desoto notice
5 of deposition?

6 MR. TENENBAUM: Our responses to the Desoto
7 notice of deposition can be found on pages 10
8 through 13 of the objections and responses to
9 the request.

10 The Desoto requests overlapped in full
11 the request of American Can and Rust-Oleum and
12 Zenith. So you will see there is a lot of
13 cross-references to the responses to the
14 American Can request, and the Rust-Oleum and
15 Zenith requests.

16 If I can expedite matters, the answer
17 is that Mr. Boice is being designated with
18 respect to some of these requests.

19 With respect to other of these
20 requests seeking information on record-related
21 matters, as we indicated, we are not going to
22 permit any testimony on record-related issues
23 that are being decided on the record in our
24 view.

1 MR. FORT: What about category number 1,
2 which is:

3 "All facts or
4 information relating to
5 whether Desoto arranged for
6 the treatment or disposal
7 of hazardous substances at
8 either or both of the Midco
9 sites."

10 MR. TENENBAUM: As indicated in the
11 cross-reference to the American Can response on
12 page 7 of the objections, the United States is
13 designating Mr. Boice to testify as to this
14 request or designation request in general only.

15 We are objecting and we reiterate at
16 this time our objections to this request on the
17 ground or to the extent that it seeks
18 information that the United States has obtained
19 from the defendants themselves or the
20 defendants' documents or third-parties',
21 third-parties' documents and deposition and
22 other testimony and/or the work product of the
23 United States attorney.

24 However, without waiving these

1 objections, we are going to designate Mr. Boice
2 to testify in general in response to this
3 designation.

4 MR. FORT: Okay.

5 MR. KARAGANIS: Mr. Tenenbaum, just for the
6 record, you were asked and you have just
7 referenced the American National Can 30 (b) 6
8 notice. And you made a general objection.

9 You were asked to produce what proof
10 you had that specific defendants, in the case
11 of American Can, specifically American Can,
12 what proof the government had that American Can
13 arranged for the disposal or arranged for the
14 transportation to either the Midco I or Midco
15 II sites.

16 Now, you either have proof or you
17 don't.

18 You are obligated under the federal
19 rules to produce that proof for examination
20 here. And, as I have indicated to you in a
21 letter that I handed you today, it is not
22 sufficient to say that you have objections to
23 the production of that proof. You must produce
24 it absent a protective order.

1 You have no protective order, and we
2 are asking that that proof be presented here
3 today through a designee.

4 Are you designating Mr. Boice?

5 MR. TENENBAUM: Speaking of last-minute
6 filings and letters, I really haven't had a
7 chance to view your letter that was handed to
8 me this morning.

9 As I have indicated, we are
10 designating Mr. Boice in response to this
11 request and we are going to allow questioning
12 on it, subject to our objections on this
13 subject.

14 I think our objections are well taken.
15 I can cite you a case in support of those
16 objections.

17 MR. FORT: Look, this is not an oral
18 argument here.

19 Counsel has noted that if Mr. Boice is
20 here as your designee for question number 1 by
21 Desoto, which is whether Desoto arranged, and
22 he is that designee, we will move on.

23 Q. Let me ask Mr. Boice this question.

24 Do you have personal knowledge of

1 whether Desoto arranged for the treatment or
2 disposal of hazardous substances at either of
3 the sites?

4 A. What do you mean personal knowledge?

5 Q. Did you ever witness a truck driving
6 material to the site from a Desoto plant?

7 A. No.

8 Q. Did you ever see drums at the site
9 that said this drum came from Desoto, or words
10 to that effect?

11 A. No.

12 Q. Do you have any other firsthand
13 knowledge of whether or not Desoto sent waste
14 to this site?

15 A. What do you mean by firsthand
16 knowledge?

17 Q. That means that you saw, observed
18 yourself, as contrasted to what somebody told
19 you or what you read someplace.

20 A. No.

21 Q. Let me go on. We will come back.

22 I just want to get and idea of what
23 kind of knowledge you may have.

24 Our second request deals with

1 information relating to whether removal or
2 remedial costs incurred or to be incurred are
3 consistent or inconsistent with the National
4 Contingency Plan.

5 Is Mr. Boice your Rule 30 (b) 6
6 designee for that item?

7 MR. TENENBAUM: As indicated in our general
8 objections, we are unable -- we are unable to
9 designate anyone in response to this request,
10 in light of our objection to it on the ground
11 that, as you know, there are many costs
12 incurred with respect to this site.

13 And this is too vague for us to be
14 able to designate any one person.

15 MR. FORT: Let me just ask Mr. Boice some
16 questions, then.

17 Q. Mr. Boice, we got as far as finding
18 out you were employed by USEPA.

19 Could you identify your business
20 address for us?

21 A. I work for US Environmental Protection
22 Agency, Waste Management Division. Mail code
23 5 HS-11, 230 South Dearborn, Chicago, Illinois
24 60604.

1 Q. Okay.

2 And what is your position with USEPA?

3 A. I'm an environmental engineer.

4 Q. And what is your involvement or
5 responsibilities with respect to the Midco
6 sites?

7 A. I have been the remedial project
8 manager since 1985.

9 Q. Okay.

10 Could you give us a --

11 MR. TENENBAUM: I am sorry to interrupt
12 you. This is why I had suggested we do the
13 deposition of Richard Boice individually first.

14 But, can I ask, are we going to have
15 to go through this six times with respect to
16 all of the notices, or is this going to satisfy
17 everybody on this general background
18 questioning?

19 MR. FORT: What we are trying to do is
20 expedite it.

21 As you say, we are not going to try to
22 repeat every question six times. At the same
23 time, each of the counsel here have an
24 obligation to their clients to make sure that

1 the questions that they think need to be asked
2 are asked.

3 And we have coordinated amongst
4 ourselves, as you asked us, to try to
5 coordinate the questions to be asked.

6 So I am going to try to ask those
7 questions that are consistent with what I have
8 already propounded for Desoto, so I understand
9 what questions I can go further with and so
10 others can hear what your position is and form
11 what strategies they need to form in terms of
12 asking their questions.

13 MR. KARAGANIS: So the record is clear, all
14 other counsel reserve their right to ask
15 specific questions if they feel that either the
16 questions or the answers previously put forth
17 to do not adequately develop the facts.

18 Nevertheless, we will attempt in
19 shaping additional questions to reflect the
20 fact that earlier questions have been asked and
21 answered. But, we are not bound by any prior
22 questions and answers given.

23 MR. TENENBAUM: Okay.

24 MR. SHELDON: Let me make a further

1 statement so the situation is clear.

2 Standard T gave the notice of
3 deposition to Richard Boice individually. And
4 as Mr. Tenenbaum knows, he has been talking
5 with my partner, Mr. David Finch, about this.
6 And it was otherwise scheduled, I believe, for
7 May 30th or 31st, but was put off to be held in
8 conjunction with these other depositions that
9 are here and to go on to day.

10 Unfortunately, I learned about 9:00
11 o'clock that Mr. Finch went in the hospital
12 early this morning with what may be a kidney
13 stone. And, consequently, I am here without
14 benefit of all his notes.

15 Having conferred with other defense
16 counsel, I want the record to show that we are
17 here for the deposition of Richard Boice
18 individually.

19 We would defer, under the
20 circumstances, to Desoto and American Can to
21 proceed first with their questions. We reserve
22 the right to ask our questions when it is our
23 turn and reserve the right to adopt any
24 questions that we wish to do so explicitly

1 after we have heard them all.

2 But, at this point that is the
3 circumstance, and it is an additional reason to
4 allow us to proceed as we had agreed among
5 ourselves, pursuant to discussions with the
6 United States and Mr. Fort and Mr. Karaganis,
7 respectively, were going to ask their questions
8 first.

9 BY MR. FORT:

10 O. Mr. Boice, what are your
11 responsibilities as a remedial project manager?

12 A. Okay.

13 The responsibilities are outlined in
14 the National Contingency Plan. But, it
15 includes overall responsibility or some overall
16 responsibility in development of the remedial
17 investigation, feasibility study.

18 Reviewing the remedial investigation
19 feasibility study for compliance with federal
20 requirements. And observing on-site
21 operations, arranging contracts with oversight
22 contractors and overseeing them, their work.

23 Q. Is there anybody else at EPA who has
24 the same level of day-to-day responsibility,

1 hands-on knowledge of what happens on a
2 remedial investigation or remedial design or
3 remedial action other than the RPM?

4 A. No.

5 Q. You are really the person who is
6 running the operation on a day-to-day basis?

7 A. What do you mean by running the
8 operation?

9 Q. You are the person that knows what is
10 happening, put it that way?

11 A. Yes.

12 Q. Okay.

13 So you would have knowledge of the
14 actions taken, and then from that others could
15 argue about whether or not it would be
16 consistent or inconsistent with the National
17 Contingency Plan, correct?

18 MR. TENENBAUM: At what time period?

19 MR. FORT: At least from '85 to date.

20 A. Would you repeat your question?

21 BY MR. FORT:

22 O. If I wanted to know who had knowledge
23 about remedial costs or remedial actions since
24 1985 with respect to the Midco sites, within

1 the context of the National Contingency Plan,
2 would you be the person that has knowledge of
3 that, of those facts?

4 A. Regarding facts regarding the site.
5 Yes.

6 Q. Okay.

7 A. Not necessarily all the cost
8 documentation, no.

9 MR. FORT: The third area that we had asked
10 for a witness and information on was whether or
11 not the hazardous substances allegedly sent by
12 Desoto to the Midco sites necessitated removal
13 or response costs sought by the United States.

14 Is Mr. Boice your indicated deponent
15 for that category as well?

16 MR. TENENBAUM: As indicated in our
17 objections, we find this request vague and
18 ambiguous as to the requirements. Therefore,
19 we were unable to designate anyone with respect
20 to that.

21 In addition, to the extent this is
22 seeking record-related information, we have our
23 general record objection.

24 MR. FORT: Okay.

1 Q. Mr. Boice, in your role as RPM, do you
2 know what the environmental conditions at the
3 Midco sites are?

4 A. I think I know them better than anyone
5 else.

6 Q. What sort of information do you have
7 to have available to you in order to understand
8 the environmental conditions at the Midco
9 sites?

10 A. The information that is usually
11 required in a remedial investigation.

12 Q. Okay.

13 When you get that information, you
14 have to know what substances are there and
15 where they are located, if they are in the
16 ground or in the water or other environmental
17 media?

18 A. To the extent that we can evaluate or
19 determine that during the remedial
20 investigation, yes.

21 Q. And isn't it true that the presence or
22 absence of contaminants in the environment is
23 what is related to whether or not removal
24 actions or response actions are necessary?

1 MR. TENENBAUM: Objection to the extent you
2 are calling for a legal conclusion, or to the
3 extent you are seeking to question the witness
4 about remedial action.

5 I will direct the witness not to
6 answer to the extent the question is directed
7 at remedy selection.

8 A. Would you repeat the question?

9 BY MR. FORT:

10 Q. I will come at it a different way.

11 MR. KARAGANIS: Would you please read back
12 Mr. Tenenbaum's instructions?

13 (The record was read.)

14 Mr. Tenenbaum, for the first time this
15 morning you have instructed the witness not to
16 answer.

17 I gave you a letter this morning
18 citing a significant number of case law cases
19 which specifically state that if your objection
20 is based on the lack of admissibility of
21 evidence, that you may not instruct the witness
22 not to answer.

23 Having been apprised of that case law,
24 is it still your position that, contrary to the

1 law in this circuit, you are going to instruct
2 the witness not to answer on the grounds that
3 the evidence being sought would not be
4 admissible?

5 MR. TENENBAUM: Well, we just received your
6 letter this morning.

7 MR. KARAGANIS: Had you studied your
8 responsibilities --

9 MR. TENENBAUM: If I can respond.

10 I don't see any cases from this
11 circuit cited in the letter, I should say from
12 the this district cited in the letter.

13 The first case you cite relates to not
14 showing up for a deposition. We are here.

15 The second set of cases you cite
16 relate to -- appear to relate, I haven't read
17 them, to general objections on grounds of
18 relevance, routine relevance objections, which
19 is not -- we don't have a routine relevance
20 objection here, by any means.

21 We have here, as you know from our
22 motion for protective order and so on, that we
23 have here a much more complicated objection,
24 which involves elements of deliberative process

1 privilege issues and, in addition, involves the
2 burden to agencies having to respond to
3 deposition discovery requests on record
4 matters.

5 MR. KARAGANIS: Mr. Tenenbaum, I must
6 strongly object to your use of boxcar
7 assertions of an ability to instruct the
8 witness not to answer.

9 The case law that we have cited to you
10 states, and I quote as follows from the J.D. .
11 Marshall case out of the Northern District of
12 Illinois, quote:

13 "The general rule in
14 this district is that absent a
15 claim of privilege, it is
16 improper for counsel at a
17 deposition to instruct a
18 client not to answer. If
19 counsel objects to a question,
20 he should state his objection
21 for the record and then allow
22 the question to be answered
23 subject to his objection."

24 Now, you have not established grounds

1 of asserting any privilege here. Your vague
2 reference is to somewhere you have asserted the
3 deliberative privilege. If you are going to
4 assert what is called the deliberative
5 privilege, you must identify the document and
6 that portion of the document for which you are
7 asserting a privilege.

8 The deliberative privilege is not a
9 blanket exception from the discovery process.
10 And I suggest to you that your instruction of
11 the witness not to answer is an abuse of the
12 discovery process and is subject to sanction.

13 MR. TENENBAUM: We couldn't agree with you
14 at all on that.

15 MR. FORT: Mr. Tenenbaum, before we
16 continue --

17 MR. TENENBAUM: It is --

18 MR. FORT: Now, wait a minute.

19 MR. BERMAN: He wanted to answer Joe first.
20 He started talking. You can't necessarily
21 interrupt.

22 MR. FORT: Mr. Berman, this is not a
23 debate.

24 Would you read back the question to

1 which there is an objection made and see if you
2 want to continue with your objection.

3 MR. TENENBAUM: Excuse me, I am not going
4 to allow --

5 I agree with you that I don't think we
6 need to have a law review debate on what the
7 law is on this. I agree with you one hundred
8 percent.

9 But, if opposing counsel is going to
10 state a position on that, I am going to retain
11 the right to respond to that position.

12 I suggest that we don't need to do
13 that, engage in these legal debates here. But,
14 once someone starts doing that, I am going to
15 have to respond.

16 As I have indicated already, to some
17 extent, my instruction not to answer is not --
18 does not appear to be -- I haven't read the
19 case, having just been giving the citation this
20 morning.

21 But, it does not appear to be on all
22 four's, by any means, with the case cited,
23 which is in a different district than our case
24 in the Northern District of Indiana.

1 And, furthermore, as I have indicated,
2 there are privilege-related issues or
3 quasi-privilege-related issues involved here.
4 I am not instructing the witness not to answer
5 with respect to documents. It is with respect
6 to questions that were asked.

7 MR. FORT: Mr. Tenenbaum, the question was
8 whether or not he would have knowledge.
9 Whether or not he has firsthand knowledge
10 concerning environmental conditions at the
11 sites.

12 Q. I believe Mr. Boice you said that --

13 MR. TENENBAUM: That one was answered.

14 MR. FORT: He said he does have knowledge
15 of the environmental conditions at the sites.

16 Q. Correct, Mr. Boice?

17 A. I don't know what you mean by
18 firsthand knowledge.

19 Q. Have you reviewed analytical data
20 collected at the site?

21 A. Yes.

22 Q. And you have reviewed engineering
23 evaluations of the analytical data collected at
24 the site?

1 A. Yes.

2 Q. You have been to the site yourself to
3 look at what the conditions are?

4 A. Yes.

5 Q. And you have asked for certain
6 investigations to be performed, haven't you?

7 A. I have asked --

8 We have asked for -- the agency has
9 asked for additional sampling, yes.

10 Q. Okay.

11 And you have reviewed all of that
12 information and satisfied yourself that it was
13 collected in a proper manner?

14 MR. TENENBAUM: Objection. Vague. What
15 information?

16 BY MR. FORT:

17 Q. You may go ahead.

18 A. What information are you referring to,
19 all the information on the whole site?

20 Q. When you review information, do you
21 make sure that the analytical data that is
22 collected -- do you make sure that analytical
23 information is reliable and can be used in
24 evaluating environmental conditions at the

1 site?

2 A. We have a quality assurance program,
3 and in accordance with that, we require PRP
4 to prepare a quality assurance project plan.
5 And that is reviewed by me and by our quality
6 assurance office and sometimes by some other
7 people, too.

8 Then when they go out and collect the
9 data, we have people overseeing the operation,
10 in this case it was Roy F. Weston, Inc., to
11 assure that the sampling was being conducted in
12 accordance with the proper procedures.

13 Q. Okay.

14 So do you have knowledge then of
15 environmental conditions at the Midco sites?

16 A. Yes.

17 Q. Okay.

18 And do you have knowledge of whether
19 those environmental conditions require that
20 something be done beyond that which has already
21 been done at the sites to contain or remove
22 contaminants at the sites?

23 MR. TENENBAUM: Objection.

24 MR. FORT: I am just asking if he has

1 knowledge.

2 MR. TENENBAUM: Whether someone has
3 knowledge on an issue that is subject to record
4 review, which this appears to be at least in
5 part and perhaps in full, I am going to have to
6 instruct the witness not to answer.

7 MR. KEATING: The question was to his
8 knowledge.

9 BY MR. FORT:

10 Q. Mr. Boice, I have asked you whether or
11 not you have knowledge about that. Do you have
12 knowledge?

13 MR. TENENBAUM: I would add an objection,
14 on the grounds of vague, ambiguous. It is not
15 sufficiently clear what you are asking.

16 MR. KARAGANIS: Your objection is noted.

17 Are you still instructing the witness
18 not to answer?

19 MR. TENENBAUM: I am instructing the
20 witness not to testify with respect to matters
21 that are subject to record review, such as
22 selection of remedy.

23 MR. FORT: Which includes if he has
24 knowledge?

1 MR. TENENBAUM: If we are asking whether he
2 has knowledge of the selection of remedy, I am
3 going to instruct him not to answer.

4 The only thing I will let him answer
5 on as to the selection of remedy is to give you
6 the general process, answers as to who made the
7 selection of the remedy, what document that was
8 made in, and the date of the document involved.
9 I will let him answer that.

10 BY MR. FORT:

11 Q. Mr. Boice, do you have the knowledge
12 that I have asked you?

13 MR. TENENBAUM: Same objection.

14 BY MR. FORT:

15 Q. Are you going to answer the question?

16 MR. TENENBAUM: If you can answer the
17 question without --

18 MR. FORT: It is my question. He going to
19 answer it or not going to answer it.

20 MR. KEATING: I have got to know the
21 question. Why don't you read back the
22 question, so you know whether he objects or he
23 has got knowledge.

24 (The question was read.)

1 BY MR. FORT:

2 Q. We have had the question read back.
3 And I would direct the question again to Mr.
4 Boice.

5 MR. TENENBAUM: I have to make my objection
6 and decide whether I am going to direct him not
7 to answer.

8 Let me see if this would help you. We
9 have in response to Desoto's interrogatories,
10 without waiving our objections on this count,
11 provided you with a list of knowledgeable
12 persons.

13 Does that answer satisfy your needs?

14 MR. KARAGANIS: There is a question
15 pending.

16 BY MR. FORT:

17 Q. The question is pending.

18 A. My answer is on the record. All that
19 information is on the record.

20 Q. All of your knowledge is on the
21 record?

22 MR. TENENBAUM: The question was whether he
23 is knowledgeable.

24

1 BY MR. FORT:

2 Q. What is your answer, sir? I didn't
3 understand your answer?

4 A. Why don't you repeat the question
5 again.

6 Q. Do you have knowledge concerning the
7 environmental conditions at the site?

8 A. Yes.

9 Q. Do you have knowledge as to whether
10 those environmental conditions indicate that
11 further remedial action is necessary beyond
12 that which has already been done?

13 MR. TENENBAUM: Same objection.

14 A. All that information is on the record.

15 BY MR. FORT:

16 Q. Which of all of your information is on
17 the record?

18 A. I don't know what you mean by that.

19 Q. Those were your words.

20 What record are we talking about here?

21 A. The administrative record for the
22 record of decision.

23 Q. For the record of decision.

24 You mean just up to the record of

1 decision, or there are other things that you
2 are calling the record?

3 A. What is in those boxes.

4 Q. Let the record reflect that the
5 witness has just pointed to a corner of the
6 room in which there are how many boxes of
7 banker's boxes purportedly containing
8 documents?

9 A. The R.O.D. administrative record
10 consists of nine of those boxes.

11 Q. Let me try to move forward, get
12 through the rest of this.

13 Q. Do you have knowledge -- or, excuse
14 me.

15 Mr. Tenenbaum, is Mr. Boice your
16 witness with respect to the category of whether
17 there may be an imminent and substantial
18 endangerment to the public health and the date
19 on which that arose?

20 MR. TENENBAUM: As indicated in our papers,
21 the issue of a finding of imminent substantial
22 endangerment, it is our contention that that is
23 subject to administrative record review.

24 Therefore, unless you make the showing

1 required by the cases, which you have not yet
2 done, and the court permits you to take
3 discovery on that, the discovery is not
4 permitted. And, therefore, we are not
5 designating someone with respect to that.

6 MR. FORT: So Mr. Boice --

7 You do not have a designee as to
8 whether or not there is a substantial
9 endangerment?

10 MR. TENENBAUM: The information as to
11 whether there is an imminent and substantial
12 endangerment is contained in the record, and
13 the record is here today.

14 The information as to when that
15 imminent endangerment first arose does not
16 appear to me to be -- to seek relevant
17 information.

18 MR. FORT: Is Mr. Boice a designee or not
19 on that item?

20 MR. TENENBAUM: As indicated, we have
21 objected to that request for designation. So
22 we have not designated anyone.

23 BY MR. FORT:

24 Q. All right.

1 Mr. Boice you have just testified that
2 you have knowledge about the environmental
3 conditions at the site.

4 Are the environmental conditions at
5 the site important or relevant to whether or
6 not there may be an imminent substantial
7 endangerment?

8 MR. TENENBAUM: I am going to object and
9 direct the witness not to answer that question
10 on the grounds that it is seeking information
11 about imminent and substantial endangerment
12 that is subject to record review.

13 BY MR. FORT:

14 Q. Mr. Boice, do you have knowledge as to
15 whether or not there is or may be an imminent
16 and substantial endangerment to the public
17 health, welfare or the environment at either of
18 the Midco sites?

19 MR. TENENBAUM: Same objection and
20 direction.

21 MR. FORT: As to whether he has knowledge
22 of that issue?

23 MR. TENENBAUM: Discovery is not permitted
24 on that issue. So why would you be permitted

1 to take discovery on who has knowledge about
2 it. You would be wasting everyone's time.
3 That is the whole purpose for the rule.

4 MR. KARAGANIS: Mr. Tenenbaum.

5 MR. KEATING: We have to know who makes the
6 decision whether there is imminent and
7 substantial endangerment. You sued us on it.
8 We need a clue.

9 MR. TENENBAUM: As I indicated in the
10 previous objection, I will permit the witness
11 to answer a question which does ask who made
12 that decision.

13 What document it is contained in and
14 the date of that document, if you want to ask
15 that question, he will answer it. That is in
16 the administrative record.

17 MR. KARAGANIS: Excuse me, Mr. Tenenbaum.
18 I join in Mr. Keating's observation that you
19 are seeking very large penalties against each
20 of the primary defendants in this case for
21 alleged failure to comply with a 106 order
22 issued by the Agency.

23 The statute says that respondents must
24 comply unless they have sufficient cause to

1 decide not to comply.

2 We are entitled to inquire into the
3 sufficient cause. Your only objection to
4 whether or not material relating to imminent
5 and substantial endangerment is discoverable
6 and this witness' knowledge of such imminent
7 and substantial endangerment is in a sentence
8 that you have in your general objection number
9 2 in your response to American Can Company's
10 request number 4, in which you say discovery
11 outside the administrative records is not
12 reasonably calculated to lead to the discovery
13 of admissible evidence and is not proper.

14 Under the case law we have referred
15 you to today -- and I can cite you a dozen more
16 cases that hold the same -- that is not the
17 basis for instructing a witness not to answer.

18 You are creating tremendous cost, you
19 are creating tremendous inconvenience, and a
20 tremendous injustice by forcing the lawyers for
21 the defendants here to go to court and to
22 obtain an order from the judge which is very
23 simple.

24 Tell us your evidence on what

1 constitutes an imminent and substantial
2 endangerment and what is needs to abate it.
3 That is a central portion of your case, it is a
4 central portion of our defense, and it is
5 critical to the factual development of this
6 case.

7 Your instructing the witness not to
8 answer under these circumstances is very
9 improper, and we will bring it to the attention
10 of the court.

11 MR. TENENBAUM: That is not true at all.

12 You have not cited us one case that
13 deals with instructions not to answer on an
14 administrative record case.

15 I don't believe any of your cases have
16 anything to do with administrative record
17 discovery.

18 In addition, these matters are already
19 before the court. They have been -- many of
20 them have been fully briefed and are awaiting
21 the court's review and decision.

22 There is no -- the only expense that
23 is involved here is caused by the defendants'
24 insistence of going forward with these

1 depositions at a date prior to the court's
2 ruling on this issue. And everybody insisted
3 on doing that.

4 I think that doesn't speak well for
5 you to complain about the cost of it. It was
6 your decision to proceed before the court ruled
7 on all the pending motions which have been
8 before the court for months.

9 MR. FORT: Mr. Tenenbaum, that is --

10 MR. KEATING: I would just like to know if
11 there is an imminent and substantial
12 endangerment in this man's mind. He has been
13 brought here to tell us that.

14 I mean, if he is here to tell us that,
15 then let him tell us that, what he is backing
16 it on.

17 MR. FORT: Mr. Tenenbaum, I have read some
18 of those things that you have filed and you say
19 repeatedly in there that your position has
20 nothing to do with liability.

21 And yet you are seeking sanctions
22 against certain defendants including my client,
23 which goes to issues of sufficient cause,
24 reasonableness of conduct, and that is

1 accepting your premise that Section 106 which
2 talks about a court may enjoin an action where
3 there is an imminent and substantial
4 endangerment, whether that is a record review
5 issue or a fundamental liability issue.

6 This questions goes to imminent
7 substantial endangerment, whether it is 106 A,
8 106 B, or any other of the provisions where
9 that concept arises in the statute. The
10 question is whether this witness has knowledge.

11 MR. TENENBAUM: You make reference to
12 sufficient cause.

13 I am sure we will have plenty of
14 opportunity to brief the legal ramifications
15 and meaning of that to determine the statute.
16 I don't think we need to do it here.

17 I think it is rather far-fetched to
18 suggest that the use of that, mention of that
19 word in the statute somehow negates the express
20 prohibitions of Section 113 J on record review.

21 MR. FORT: Mr. Tenenbaum, I don't
22 understand your position.

23 I mean, even if I accepted your
24 position on record review, the question here at

1 least goes to the question of mitigation and
2 sufficient cause, and does this witness have
3 knowledge of the facts. Does he?

4 Q. Mr. Boice, do you have knowledge as to
5 whether or not there is an imminent and
6 substantial endangerment?

7 MR. TENENBAUM: Same objection and
8 instruction.

9 MR. FORT: I am not asking what the
10 decision was. I am not asking who made it.
11 Who said yes to it, who said no to it. Does he
12 agree with it. Does he have knowledge about
13 it.

14 MR. TENENBAUM: Subject to our objections,
15 we have already answered your interrogatories
16 as to all of the knowledgeable persons.

17 If you want --

18 MR. FORT: This person is one of the
19 knowledgeable people, I thought. Does he have
20 knowledge? Now are we back off of what you put
21 in the interrogatory answers.

22 MR. TENENBAUM: I have a problem with your
23 question in that it is vague and ambiguous, and
24 I don't know what you are asking him.

1 He has already testified as to what
2 his position is.

3 MR. FORT: The question remains does he
4 have knowledge.

5 Q. Mr. Boice, do you have knowledge as to
6 whether there may exist an imminent and
7 substantial endangerment at the Midco sites?

8 MR. TENENBAUM: Same objection and
9 instruction.

10 You may answer to the extent you can
11 describe the general process and decision
12 document and date.

13 BY MR. FORT:

14 Q. Who did make the decision on that
15 issue?

16 Has anybody made a decision on that
17 issue?

18 A. Yes. It was made by Basil G.
19 Constantelos in the unilateral administrative
20 order issued November 15, 1989, which became
21 effective December 29, 1989.

22 Q. So Mr. Constantelos has knowledge of
23 all these matters?

24 Mr. Boice, does Mr. Constantelos have

1 knowledge of all these matters?

2 MR. TENENBAUM: Same objection and
3 instruction.

4 MR. HILL: Can we go off the record for a
5 second.

6 (Discussion had off the record.)

7 MR. FORT: Back on the record.

8 I think there was a question pending
9 about the knowledge of Mr. Constantelos.

10 MR. TENENBAUM: Asked and answered. Same
11 objection.

12 BY MR. FORT:

13 Q. Does Mr. Constantelos have knowledge,
14 Mr. Boice?

15 Does Mr. Constantelos have knowledge
16 of these matters?

17 MR. TENENBAUM: What do you mean by
18 knowledge?

19 MR. FORT: Well, this witness has indicated
20 that Mr. Constantelos signed the unilateral
21 administrative order.

22 My question is did Mr. Constantelos
23 have knowledge of the environmental conditions
24 particularly where there was an imminent and

1 substantial endangerment when he signed those
2 orders, Mr. Boice?

3 MR. SHELDON: Let's have a five minute
4 recess.

5 (Whereupon a short recess was taken.)

6 MR. FORT: Can we go back on the record.

7 We have taken a brief recess while
8 counsel for the plaintiff has conferred. And I
9 have a question pending as to Mr. Boice,

10 MR. BERMAN: Wait a second.

11 MR. FORT: I have a question pending to Mr.
12 Boice as to whether or not Mr. Constantelos has
13 knowledge.

14 MR. TENENBAUM: Let me state for the record
15 that these are complicated questions relating
16 to discovery and to administrative record
17 review issues.

18 We have subject to our objections
19 already answered the questions of Defendant
20 Desoto with respect to knowledgeable
21 individuals, in our answers to their
22 interrogatories.

23 I don't know why you insist on
24 following that up here with the same question

1 that we have already answered by interrogatory.
2 But since he is insisting on that, I will take
3 a break and confer to decide whether or not we
4 will permit any further answer to the question.

5 MR. FORT: You are going to take a break
6 before you decide whether or not he can answer
7 whether Mr. Constantelos has knowledge?

8 MR. TENENBAUM: We are going to a take a
9 break to decide whether or not I am going to
10 direct him not to answer any further than he
11 already has.

12 MR. FORT: Thank you.

13 (Whereupon a short recess was had.)

14 MR. FORT: We are back on the record.

15 MR. TENENBAUM: Yes.

16 Since in our answers to
17 interrogatories we have, subject to our
18 objections, permitted an answer to the
19 identification of certain knowledgeable
20 individuals, I am going to permit the witness
21 to answer that question subject to our
22 objections, to the extent that he knows the
23 answer to that question.

24 I will, however, follow up by

1 directing the witness not to answer any
2 questions on trying to probe the administrative
3 decision-making process.

4 You can answer the question if you
5 know the answer.

6 A. What was the question again?

7 BY MR. FORT:

8 Q. Whether Mr. Constantelos has knowledge
9 about the environmental conditions of the Midco
10 sites.

11 A. That is a different question.

12 MR. TENENBAUM: I think that is a different
13 question.

14 BY MR. FORT:

15 Q. I thought you didn't know the
16 question.

17 Why don't you tell us what knowledge
18 you think Mr. Constantelos has, subject to your
19 counsel's objections?

20 MR. TENENBAUM: Same objection.

21 BY MR. FORT:

22 Q. You may answer.

23 MR. TENENBAUM: To the extent you are
24 trying to probe the administrative

1 decision-making process, you are not entitled
2 to do this and I will direct the witness not to
3 answer.

4 If your question is, is Mr.
5 Constantelos knowledgeable, have any knowledge
6 about the finding of imminent and substantial
7 endangerment. Then subject to our objections,
8 I will let him answer if he knows the answer.

9 Is that your question?

10 MR. FORT: No.

11 My question was whether or not Mr.
12 Constantelos had knowledge of the environmental
13 conditions at the Midco sites.

14 There is a question pending.

15 MR. TENENBAUM: That is a different
16 question than we had before the break. That
17 may go to issues that are not related to remedy
18 selection.

19 MR. KEATING: How do we know unless he
20 answers?

21 He is asking his knowledge. If he
22 says yes, then you can make an objection. If
23 he says no, then you don't have an objection.

24 You are making preliminary objections

1 to questions. If he has knowledge, then he can
2 say yes or no, then you make the objections
3 after you get the knowledge.

4 It doesn't make any sense to make an
5 objection when he says do you have knowledge of
6 something, you say I object. What if he says
7 no, then you don't have an objection.

8 MR. TENENBAUM: The question was not
9 whether he has knowledge. Whether someone else
10 has knowledge.

11 MR. KEATING: If you want to answer the
12 question yes or no, that is a good start.

13 MR. TENENBAUM: You may answer the question
14 to the extent that you can answer it without
15 getting into the remedy selection or the
16 administrative substantial findings
17 decision-making process.

18 MR. FORT: Is that an instruction not to
19 answer as to certain things?

20 MR. TENENBAUM: That is a partial
21 instruction not to answer.

22 MR. FORT: All right.

23 A. What was the question again.

24 MR. FORT: Can you read it back, please.

1 (The record was read.)

2 A. The answer is yes.

3 BY MR. FORT:

4 Q. And what is your basis for that
5 answer?

6 MR. TENENBAUM: Can I have a continuing
7 objection and instruction on this, or do you
8 want me to say it for each question?

9 MR. KARAGANIS: Mr. Tenenbaum, if you are
10 going to instruct the witness not to answer a
11 question, you better be specific on each
12 question you are instructing him not to answer.

13 MR. TENENBAUM: Okay.

14 Same objection. Instruct the witness
15 not to answer to the extent the answer would
16 involve any probing of the administrative
17 decision-making process of selection of remedy
18 or finding of imminent and substantial
19 endangerment.

20 A. I can't answer the question.

21 BY MR. FORT:

22 Q. You don't know why you think Mr.
23 Constantelos has knowledge?

24 A. No. We are objecting to the question.

1 Q. Okay.

2 You can't say why Mr. Constantelos had
3 knowledge without explaining the deliberative
4 process?

5 MR. TENENBAUM: As I indicate before, the
6 witness can answer to the extent of the
7 decision document.

8 You can answer to the extent of the
9 decision document.

10 A. I don't think we can answer the
11 question.

12 BY MR. FORT:

13 Q. You made reference earlier to a record
14 of decision.

15 What is a record of decision?

16 A. What a record of decision is is
17 explained in the National Contingency Plan.

18 Q. What is a record of decision?

19 A. It is an official decision by the
20 agency, including attachment explaining site
21 conditions and justification for the decision,
22 signed by the decision-maker or the delegated
23 decision-maker for the agency.

24 Q. Is there such a record of decision for

1 the Midco sites?

2 A. There is two records of decision. One
3 for Midco I and one more Midco II.

4 Q. Who signed those records of decisions?

5 A. Valdus Adamkus.

6 Q. Who is he?

7 A. He is the regional administrator for
8 Region V, US Environmental Protection Agency.

9 Q. Do you have knowledge as to the
10 environmental conditions relating to the
11 decision recorded in the document called a
12 record of decision?

13 MR. TENENBAUM: Objection, vague.

14 A. What do you mean?

15 BY MR. FORT:

16 Q. What is include in a record of
17 decision document?

18 A. It is right here. We can inspect it
19 if you want to.

20 Q. Can you describe for us what is
21 included in it, short of us having to read the
22 entire document?

23 A. No.

24 I would rather get the document out so

1 we wouldn't miss anything.

2 Q. Mr. Adamkus would have knowledge
3 concerning what is included in the record of
4 decision?

5 A. Yes.

6 MR. MOORE: Counsel, go don't through this
7 record. Okay?

8 MR. FORT: Is there a problem here.

9 MR. KARAGANIS: Let's go on the record on
10 this. I want to inspect the record.

11 Could you identify yourself for the
12 record?

13 MR. MOORE: My name is Peter Moore. I am
14 with the United States Environmental Protection
15 Agency.

16 And due to problems that we have had
17 in the last few weeks with the record and the
18 integrity of the record, we have to maintain
19 that integrity and we will not be compromised
20 until questions are asked pertaining to
21 something specific.

22 MR. FORT: For the record, let the record
23 show that Mr. Karaganis just strolled over to
24 the corner and started to look at the boxes

1 over there.

2 Since I think we know where the
3 government stands on this first areas that I
4 was going to explore, I would like to shift the
5 questioning and let Mr. Karaganis ask a few
6 questions about this set of boxes and so-called
7 record that we have heard so much about so far.

8 MR. KEATING: I would like to find out what
9 integrity has been a problem with in the last
10 week.

11 MR. KARAGANIS: Mr. Keating, we will find
12 that out when we go through it

13 Mr. Tenenbaum, may I proceed?

14 MR. TENENBAUM: We are not going to bounce
15 back and forth. If you are done he can
16 proceed.

17 MR. KARAGANIS: He is not done. We are
18 going on to a different category, because we
19 are attempting to define --

20 This is our deposition, first of all,
21 but you have made a number of objections
22 alluding to an administrative record.

23 One of things we are going to try and
24 find out here is exactly what this

1 administrative record is. I have prepared some
2 questions with regard to it, and I intend to
3 proceed.

4 MR. TENENBAUM: We can proceed in order.

5 As you all know, it is highly
6 irregular to have multiple rounds of questions
7 by the same questioner that is not on redirect.

8 MR. KARAGANIS: Mr. Boice, we are
9 proceeding --

10 MR. BERMAN: We are objecting.

11 MR. TENENBAUM: If you are going to
12 proceed, I reserve the right to object to all
13 further questioning by the first attorney that
14 began.

15 MR. FORT: I have gotten through the first
16 line on my things on my list here, counsel.

17 You are not here to elongate this,
18 but, counsel, you are responsible for us having
19 taken the better part of an hour to ask five
20 simple questions about whether this person is a
21 Rule 30 (b) 6 deponent or not, yes or no, or
22 whether or not he has knowledge, yes or no.

23 MR. TENENBAUM: Excuse me.

24 You are responsible for any and all of

1 that, because you have insisted that this
2 deposition take place before the court has
3 resolved the issues of administrative record
4 review.

5 MR. KARAGANIS: Mr. Tenenbaum, it was at
6 your request that we coordinated these
7 depositions. We had separate dates for these
8 depositions.

9 You agreed that we would be in charge
10 of deciding how to best coordinate with respect
11 to the questioning. We told you at the
12 beginning of this deposition that we had asked
13 individual counsel to be major questioners
14 reserving the right of any other counsel to add
15 additional questions as necessary to represent
16 his or her client.

17 We are about to proceed on a category
18 as defining what you called the administrative
19 record.

20 Will you allow us to proceed, please?

21 MR. TENENBAUM: I am going to allow you to
22 proceed, but I am going to object for the
23 record to this kind of questioning, multiple
24 questioning, which is unfocused and

1 MR. FORT: It is hardly unfocused, sir.

2 We have been specific as to documents.
3 And are you going to allow this witness to
4 answer questions from me when I resume the
5 questions after Mr. Karaganis has moved on to
6 this other topic?

7 I don't intend to repeat Mr.
8 Karaganis' questions as to those, the contents
9 of those nine boxes. But, we are trying to
10 make the best use of everybody's time here.

11 And there has been a laborious
12 process, to say the least, for you simply to
13 answer simple questions on four or five
14 categories.

15 MR. TENENBAUM: As you know, the questions
16 you have asked are the heart of the
17 record-review issues, which are pending before
18 the court.

19 MR. FORT: And I think it is very clear
20 that we can go through these and not have --

21 If you insist upon objecting to my
22 resuming questions after Mr. Karaganis has
23 asked you questions that he has prepared
24 concerning this record, if you are going to

1 object on that, then I am going to continue
2 with my questions.

3 MR. KARAGANIS: Mr. Tenenbaum, we are
4 trying to do this to save everybody's time.

5 I intend to ask about a specific
6 category of information with respect to the
7 contents of the record. I then at some other
8 time intend to go into other categories.

9 But, we are trying to assign major
10 categories or major areas to individual
11 counsel, with the reservation of other counsel
12 having the right to supplement.

13 MR. BERMAN: Can we go off the record for a
14 minute?

15 MR. KARAGANIS: Otherwise, we are going to
16 do it strictly in series.

17 MR. BERMAN: Let's go off the record for a
18 minute.

19 (Discussion had off the record.)

20 MR. FORT: Back on the record.

21 We have just discussed the
22 government's objection to this request or
23 designation or indication Mr. Karaganis was
24 going to go forward.

1 And we have reached an agreement -- I
2 want to confirm this -- that the government is
3 agreeable to Mr. Karaganis going forward for
4 the purpose of identifying the record that has
5 been referred to, and that that is without
6 prejudice to my resuming my line of questioning
7 after Mr. Karaganis finishes that area.

8 MR. KARAGANIS: Is that correct, Mr.
9 Tenenbaum?

10 MR. TENENBAUM: That is correct.

11 In this one limited instance we will
12 agree.

13 MR. SHELDON: Mr. Tenenbaum, just for
14 absolute clarity. I may I have some questions
15 that will relate to the record and Mr.
16 Karaganis' questions are not to preclude me
17 from asking further questions relating to the
18 record.

19 MR. FORT: There will be more questions
20 relating to the record, but let's get the basic
21 issue forward.

1 DIRECT EXAMINATION

2 BY MR. KARAGANIS:

3 Q. Mr. Boice, with respect to the
4 document that is called an R.O.D., or record of
5 decision, as to the Midco I site, does the
6 agency compile a series of documents that it
7 calls its administrative record for that record
8 of decision?

9 A. Yes.

10 Q. All right.

11 Did you bring that administrative
12 record with you today?

13 A. Yes. As far as we know it is
14 complete.

15 Q. All right.

16 Would you please bring the boxes of
17 documents that you believe is the
18 administrative record for the Midco I record of
19 decision forward, please?

20 MR. TENENBAUM: I am going to allow him to
21 proceed on this.

22 But, I do want to state for the record
23 my objection that discovery into the
24 compilation of the record and so on and so

1 forth is not permitted, absent the required
2 showing under the case law that we have cited
3 in our briefs.

4 MR. KARAGANIS: Mr. Tenenbaum, you have
5 gone again outside the scope of my questioning.

6 I am simply trying to find out what
7 the record is. We will get into how perhaps it
8 was compiled later. I want to first find out
9 first what it is.

10 I want to see what the document looks
11 like. I would request that you please produce
12 this mythical record.

13 MR. TENENBAUM: For the record, indices
14 have been certified to the court and you have
15 all been given copies of them.

16 BY MR. KARAGANIS:

17 Q. Excuse me, Mr. Boice.

18 Would you please bring the Midco I
19 administrative record supporting the R.O.D. or
20 record of decision in Midco I forward, please?

21 MR. TENENBAUM: May I continue with my
22 objection? I was not through.

23 The record, in accordance with normal
24 agency procedure, is available for the review

1 of the various interested parties.

2 It is highly irregular to bring a
3 record to a deposition and subject the agency
4 to deposition questioning on a record, in the
5 absence of the required showing under the case
6 law.

7 In the interest of accommodating you
8 and avoiding a needless battle over whether we
9 should bring the record here, I have agreed to
10 bring it here. But, I still object to doing
11 that for the record.

12 And I will let him answer your
13 question, but I object to this whole process.

14 MR. KEATING: What process? I don't
15 understand.

16 He asked to see the record. Are you
17 objecting to him asking to see the record.

18 MR. KARAGANIS: His objection is noted,
19 Jim.

20 MR. KEATING: Just get damn record on the
21 table?

22 MR. KARAGANIS: That's what I am asking
23 for.

24 MR. TENENBAUM: Subject to my objects, but

1 he may do so.

2 MR. KARAGANIS: Thank you.

3 Q. Mr. Boice, would you please bring the
4 administrative record for the Midco I record of
5 decision forward please?

6 A. The record is available right there.

7 Q. Will you please? I was told not to
8 touch it.

9 Would you please get the boxes that
10 constitute the Midco I record of decision,
11 please?

12 MR. TENENBAUM: The Midco I record of
13 decision is indicated in the index for that.
14 We will be glad to attach that as an exhibit,
15 and will bring that document here.

16 MR. KARAGANIS: I am asking today for the
17 administrative record for Midco I record of
18 decision.

19 Q. Would you please bring it forward,
20 please?

21 MR. TENENBAUM: The administrative record
22 for the Midco I record of decision, the index
23 of that has been certified to the court. I
24 will be glad to have that as an exhibit.

1 I will also be glad to his bringing
2 the boxes up here, but it is not going to be
3 his bringing the boxes here that certifies the
4 record, it is going to be the index that
5 certifies the record.

6 BY MR. KARAGANIS:

7 Q. Would you please get the record for
8 the Midco I record of decision to the table,
9 please?

10 MR. TENENBAUM: You may bring the boxes
11 that appear to constitute the documents in the
12 index for the R.O.D. for Midco I to the best
13 extent that you can in this framework of this
14 deposition, and subject to my objection.
15 What constitutes the R.O.D. will be included
16 within the index which is presented to the
17 court.

18 MR. KARAGANIS: Fine.

19 A. Put them on the table?

20 Q. Please.

21 MR. BERMAN: Off the record for a minute.

22 (Discussion had off the record.)

23 MR. KARAGANIS: We are on the record.

24 Q. Please bring the boxes that contain

14
1 any portion of the Midco I administrative
2 record and put it on the table, please.

3 A. Do you want to put it right here?

4 Q. That's fine.

5 Let the record show that Mr. Boice
6 last brought to the table where the deposition
7 is being taken a total of one, two, three, four
8 five -- six boxes.

9 Is that correct, Mr. Boice?

10 A. Correct.

11 Q. Now, Mr. Boice, do all of those
12 boxes -- I am sorry.

13 Are the contents of all of the six
14 boxes that you have brought to the table
15 limited to the administrative record for the
16 Midco I R.O.D.?

17 A. No. Three of boxes also contain
18 portions of the administrative record for the
19 Midco II R.O.D..

20 Q. All right.

21 Now, if I might, Mr. Boice, would you
22 kindly point me to the record that has -- or, I
23 am sorry -- to the box that has the record of
24 decision document for Midco I?

1 MR. TENENBAUM: Let me object to this whole
2 process, but I will allow him to do it.

3 BY MR. KARAGANIS:

4 Q. Go ahead, Mr. Boice.

5 MR. TENENBAUM: You don't need a deposition
6 to find documents in the record, contrary to
7 agency procedure and the law.

8 BY MR. KARAGANIS:

9 Q. Go ahead, Mr. Boice.

10 While you are doing that, I will state
11 for the record that I have repeatedly asked for
12 a copy of the Midco I R.O.D. only to receive a
13 document that I can't read. So, I am going to
14 find out where the Midco I R.O.D. is.

15 Mr. Boice, would you please find it
16 for me?

17 MR. TENENBAUM: For the record, the Midco I
18 R.O.D. was given to all potentially responsible
19 parties in this case as well, we believe. We
20 will verify that.

21 A. This is Midco II.

22 BY MR. KARAGANIS:

23 Q. I am asking you for the Midco I R.O.D.

24 A. Here it is.

1 Q. Mr. Boice, you are referring to a
2 document which has green bound covers, which
3 has a legend on it on the label, "USEPA
4 Administrative Record Index Update Number 2,
5 Midco I, Gary, Indiana, November 1989, Part 2
6 of 3;" is that correct?

7 A. Correct.

8 Q. All right.

9 And you have turned my attention to a
10 document that is entitled, "Declaration for
11 record of decision," which has a stamped number
12 on it with the numbers 00033; is that correct?

13 A. Correct.

14 Q. And also a red star?

15 A. Correct.

16 Q. And can you tell me with respect to
17 this document, you have given me the beginning
18 page; can you tell me where the last page of
19 that document is?

20 MR. TENENBAUM: I again reiterate my
21 continuing objection to this type of
22 questioning about the contents of the record.

23 A. That is the last page.

24

1 BY MR. KARAGANIS:

2 Q. Now, the last page of the document
3 does not have a number, a Bates stamped number
4 on it?

5 A. Correct.

6 Q. Would it be correct that the next page
7 after the last page of the Midco I record of
8 decision document is another document that has
9 a beginning number 00034 and a red star on it?

10 A. Yes.

11 Q. Now, Mr. Boice, with respect to the
12 administrative record to support the document
13 you have just identified as the Midco I R.O.D.,
14 do you have a centralized or coordinated index
15 for that administrative record?

16 A. Yes, that was mailed to you.

17 Q. Do you have it with you?

18 MR. TENENBAUM: Same objection.

19 A. Do you have a copy of it? I don't
20 have a copy with me, but it is contained in
21 these documents.

22 BY MR. KARAGANIS:

23 Q. Well, would you find it for me,
24 please?

1 Don't loose my spot, please.

2 A. I already did.

3 Q. Excuse me, I will keep it out. I can
4 find it.

5 A. Okay.

6 This is the update index here.

7 Q. No, Mr. Boice.

8 Without respect to the update, do you
9 have one centralized administrative index to
10 the administrative record for Midco I?

11 A. Yes. It has been mailed to you.

12 Q. Do you have it here?

13 A. It is contained, under each update
14 there is an index in front of each update.

15 Q. Is there a central index with one
16 index for the Midco I R.O.D.?

17 A. Yes. We have mailed it to you.

18 Q. Well, I am going to ask you at the
19 lunch break to please bring a copy for this
20 afternoon's session of the deposition.

21 Now, Mr. Boice, with regard to the
22 Midco I R.O.D., this was in a box, a cardboard
23 box was it not?

24 A. Yes.

1 Q. All right.

2 And just so I don't lose the proper
3 place of it, would you show me where it goes in
4 the box? All right.

5 Now, Mr. Boice, if we can identify the
6 boxes beginning with the first box up here
7 which has a yellow piece of paper on it called,
8 Midco I Original AR."

9 Do you know whose handwriting or
10 printing that is on that yellow label?

11 A. It is mine.

12 Q. All right.

13 So you wrote, "Midco I original AR"?

14 A. Yes.

15 Q. What do the words "AR" stand for?

16 A. Ad --

17 MR. TENENBAUM: Wait a second.

18 Let me state my continuing objection
19 to this probing of the administrative record
20 without proper showing to the court.

21 MR. KARAGANIS: Mr. Tenenbaum, all I am
22 doing is trying to identify box labels at this
23 point.

24 Q. Mr. Boice, the letters "AR" stand for

15

1 what?

2 A. Administrative record.

3 Q. All right.

4 Now, Mr. Boice, I would like this box
5 identified as Boice Group Deposition Exhibit
6 No. 2, please.

7 A. That is all the box --

8 MR. TENENBAUM: I am going to object to
9 designation of the record as a deposition
10 exhibit.

11 MR. KARAGANIS: You may object.

12 This happens to be an official
13 judicial proceeding, where you ar entitled to
14 identify the documents. Because we, too, are
15 worried about custody and insertion of
16 documents.

17 We are going to identify what your
18 record is, what are their contents, as they are
19 currently before us today.

20 If you then later want to supplement
21 or add, you are going to have to make some
22 justification for it.

23 MR. TENENBAUM: I am going to reiterate my
24 objection to the extent you are asking that

1 this somehow be established as the official
2 record.

3 That is, all of the yellow post-its on
4 top, it is my understanding that they are not
5 part of the record?

6 A. They are not part of the record.

7 BY MR. KARAGANIS:

8 Q. Would you please mark this box as
9 Boice Deposition Exhibit No. 2, the box having
10 the yellow label, "Midco I Original AR."

11 MR. TENENBAUM: Off the record for a
12 second.

13 MR. KARAGANIS: Let's stay on the record.
14 I plan on handling this exhibit by marking each
15 box as an exhibit.

16 MR. TENENBAUM: That's not what I meant.

17 I meant, who is going to maintain the
18 custody of these? Are you going to return
19 these to us?

20 MR. KARAGANIS: We are going to have them
21 copied at a place of your choice and under your
22 supervision at our cost, and there will be
23 integrity maintained under your supervision at
24 all times.

1 But, we are going to make sure that a
2 true and correct copy of this record is
3 available to the defendants to review.

4 MR. BERMAN: Let's go off the record for a
5 minute.

6 MR. TENENBAUM: Just a second.

7 MR. BERMAN: Let's go off the record for a
8 minute so we can discuss this.

9 MR. KARAGANIS: I don't want to go off the
10 record. I want to identify exhibits.

11 We will talk about what we do with
12 them later.

13 MR. TENENBAUM: These are the agency's
14 documents. The agency has established
15 procedures for copying of record documents. We
16 are not going to depart from them under any
17 circumstance.

18 MR. KARAGANIS: With respect to copying,
19 Mr. Tenenbaum, we will make arrangements to
20 follow your procedures with respect to copying.

21 Right now I am about the business of
22 identifying so a judge can later identify for
23 purposes of reviewing a deposition what
24 constitutes these documents.

1 MR. BERMAN: Mr. Karaganis, you have to
2 understand that you cannot take control of the
3 record.

4 MR. KARAGANIS: I don't ask to take control
5 of it, Mr. Berman. I am not asking to take
6 control of it.

7 MR. BERMAN: It is part of an agency
8 record. People have a right to look at the
9 record. If somebody comes up tomorrow to see
10 it at the agency, they can look at this record.

11 MR. KARAGANIS: Mr. Berman, I am not asking
12 to take custody of a record.

13 Once it is an official deposition
14 exhibit and you modify it, you are subject to
15 sanction by the court.

16 MR. TENENBAUM: If that event, if you are
17 going to tell us that.

18 MR. KEATING: Just mark it, then we can
19 fight later.

20 MR. TENENBAUM: I am going to object to the
21 marking of this as an exhibit.

22 MR. KARAGANIS: Your objection is noted.
23 Would you mark this box.

24 MR. TENENBAUM: I will not permit the court

1 reporter to alter the record by putting any
2 identification on it.

3 MR. KARAGANIS: I am asking him to put a
4 deposition exhibit on the box cover.

5 MR. TENENBAUM: He is not permitted to do
6 that. This is an agency document.

7 MR. KARAGANIS: Mr. Court Reporter, please
8 go forward.

9 MR. BERMAN: You can't instruct him to do
10 that.

11 These are United States government
12 files and you are trying to take control of it.

13 MR. KARAGANIS: You are trying to hid
14 information, Mr. Berman.

15 We are not trying to take control of
16 it.

17 MR. BERMAN: I object to that. Will you
18 talk in civilized terms?

19 I object to your accusation. We are
20 trying to do it in a reasonable way and I
21 expect you to do that it way.

22 MR. TENENBAUM: Mr. Karaganis, have you not
23 offered to bring in a camera to take
24 photographs of these documents?

1 MR. KARAGANIS: Yes, I have, an I will do
2 so.

3 MR. TENENBAUM: Why do we have to go
4 through this?

5 MR. KARAGANIS: Because they are going to
6 be identified as exhibits.

7 We will have a camera crew here
8 tonight or tomorrow to film them under your
9 custody and control, after they have been
10 identified with exhibits numbers.

11 MR. TENENBAUM: You are welcome to make
12 whatever arrangements you can with respect to
13 copying of the administrative record, but we
14 are not going to deface these documents with an
15 exhibit number, because these are not --

16 MR. KEATING: You are not going to allow
17 the marking of the exhibit, counsel?

18 I don't think you want to say that.

19 MR. BERMAN: I assume what you can do,
20 there are a lot of possibilities here. You can
21 make a copy. You can mark your copies, I
22 assume.

23 MR. KARAGANIS: Please mark the boxes as
24 serial exhibit numbers.

1 MR. KEATING: What is the big problem on
2 that?

3 MR. KARAGANIS: Go ahead.

4 MR. BERMAN: I am afraid you can't mark the
5 box. We can try and work it out. We can take
6 a break. We can make copies.

7 MR. KARAGANIS: Take a break?

8 MR. BERMAN: We can come back with
9 different documents.

10 You can't mark the boxes. These are
11 United States government files. You cannot
12 mark the boxes.

13 MR. FORT: Mr. Karaganis, it appears that
14 the government's only way of stopping these
15 documents from being marked is to keep talking
16 so the court reporter has to keep writing it
17 down.

18 I suggest we go off the record and let
19 the court reporter put the labels on the boxes
20 and we can proceed.

21 MR. TENENBAUM: No. I don't think that
22 will be acceptable.

23 (Discussion had off the record.)

24 MR. KARAGANIS: Hold it. Let's go back on

1 the record.

2 I am going to get each of these boxes
3 identified the best way I can. And then I am
4 going to keep custody of them in this room with
5 your guards present until we can get ahold of
6 the magistrate.

7 MR. BERMAN: I object.

8 You can't you can't personally control
9 the federal government's administrative records
10 and documents. And I object strenuously.

11 If you want us to come back with them,
12 we will bring them back, and put them in our
13 file.

14 BY MR. KARAGANIS:

15 Q. Mr. Boice, please identify the next
16 box please.

17 MR. TENENBAUM: Excuse me. May we get some
18 control over these proceedings here.

19 We have offered to make whatever
20 arrangements are necessary for your obtaining
21 copies of any of these.

22 We have brought these here subject to
23 our objections, only to try to avoid what we
24 thought was an unnecessary battle over whether

1 we had to bring them here.

2 Now you are trying to take this much
3 further step and mark these administrative
4 record as a deposition exhibit.

5 I don't believe there is any precedent
6 for doing that that I am aware of. And you
7 have not cited any to us on that.

8 In fact, there is no precedent that
9 you have complied with for taking discovery on
10 these records.

11 MR. KARAGANIS: Mr. Tenenbaum, you have
12 repeatedly stated to the court that there is an
13 administrative record in existence.

14 We see a number of boxes that have
15 mixed documents with respect to mixed
16 administrative records.

17 We are simply trying to identify which
18 box contains which administrative record for
19 which order. There are two 106 orders
20 outstanding. There are two R.O.D.'s
21 outstanding. You have said that they are
22 administrative records supporting each.

23 We are entitled to identify -- so that
24 a judge may review this deposition -- what

1 those documents are. And the only way that
2 that can be done is with respect to putting
3 deposition exhibit numbers at a minimum on the
4 boxes.

5 MR. TENENBAUM: No. I don't believe that's
6 the only way that could be done.

7 You have been given indexes for these
8 which indicate the title of the document and
9 the number of pages in the document and so on.

10 And if you are not happy, we were, of
11 course, prepared to certify these physical
12 documents to the court.

13 As was indicated in our papers, the
14 court indicated there was a docket clerk at
15 this time that only wanted to receive indexes.

16 If you are not happy with that, you
17 believe that the integrity of the documents is
18 subject to change somehow, or the documents may
19 change; if that's your position, I suggest we
20 make a motion to the court at this time or
21 whenever you feel that you need to have that
22 done.

23 We can make a joint motion to the
24 court that they be given the physical custody

1 of these boxes.

2 But, it is not going to be by
3 deposition exhibits. It is going to be
4 pursuant to a motion to the court for official
5 certification of the documents, as well as the
6 indexes that has already been certified.

7 We will be glad to enter in that
8 motion with you, but a deposition is not the
9 proper way to do this.

10 MR. KARAGANIS: Mr. Tenenbaum, I take it
11 you are not going to allow these documents to
12 be identified as a deposition exhibit?

13 You are going refuse?

14 MR. TENENBAUM: You can call anything you
15 want a deposition exhibit, but we are not going
16 to allow you to alter the official contents of
17 the record.

18 MR. KARAGANIS: We are not asking to alter,
19 if I put a sticker on a box.

20 MR. TENENBAUM: That is altering the box.

21 MR. KARAGANIS: That's altering the box?

22 MR. BERMAN: It is a basic problem -- there
23 is a basic problem. This is an official
24 government record.

1 What you really want to do is arrange
2 to get some copies, and then you can bring the
3 copies here. You can identify them, and I
4 assume you can mark those.

5 But, this is the government record.
6 We brought it over, we have custody of it. We
7 have to maintain it, maintain its integrity.
8 It is not going to become a deposition exhibit.
9 It shouldn't become a deposition exhibit.

10 MR. KARAGANIS: Our objection is noted and
11 your refusal to have them labeled.

12 May I proceed, please?

13 Q. Mr. Boice, I am directing your
14 attention to a box that has the label, "Midco I
15 Original AR."

16 Can you tell me what the contents of
17 that box is?

18 MR. TENENBAUM: Same objection.

19 MR. KARAGANIS: Let the record show that
20 the contents of the box is a series of
21 loose-leaf pages.

22 A. The contents are indicated on this
23 index at the front of the box.

24 MR. TENENBAUM: For the record, just so

1 there is no confusion, the post-it label that
2 Mr. Karaganis read from is not part of the
3 official record.

4 The official designation of this box
5 is, I believe, indicated on the numbering on
6 the side of the box, is that correct,
7 indicating --

8 MR. BERMAN: No?

9 A. The box it is in, the record itself
10 are the documents.

11 MR. BERMAN: The record itself, right.

12 BY MR. KARAGANIS:

13 Q. Mr. Boice, with respect to the box --

14 MR. TENENBAUM: I just have --

15 MR. KARAGANIS: May I finish my question?

16 MR. TENENBAUM: I just want to finish my
17 objection.

18 The post-its that you are referring to
19 are not part of the record and they are not
20 necessarily going to be remaining on that box.

21 MR. KARAGANIS: Then I would ask that the
22 "Midco I Original AR" post-it label be
23 identified as Boice Deposition Exhibit 2,
24 please.

1 (The document above-referred to
2 was marked Boice Deposition
3 Exhibit No. 2 for identification.)

4 Let the record show that I am
5 replacing where it originally was the post-it
6 label that has been marked Boice Deposition
7 Exhibit 2, "Original AR" on the box that has
8 handwritten on it, "Midco I, one set of
9 copies."

10 MR. BERMAN: What I suggest is we leave the
11 post-it label off the box now that you marked
12 it.

13 MR. KARAGANIS: No, it is on the box.

14 It is staying on the box for custody
15 and control.

16 Q. Mr. Boice, when it says, "Midco I, one
17 set of copies," where are the originals to the
18 documents that are listed as, "Midco I, one set
19 of copies"?

20 A. My understanding is that our
21 contractor keeps one set of copies.

22 Q. Where is the original?

23 MR. TENENBAUM: Same objection.

24 A. There are -- the originals are in

1 various files in the agency.

2 BY MR. KARAGANIS:

3 Q. All right.

4 So would it be fair to say that the
5 originals to the documents that are contained
6 in the box that has the post-it label Boice No.
7 2 are not contained in the administrative
8 record?

9 MR. TENENBAUM: Objection.

10 The reference to the post-it is not
11 proper under the circumstance, and objection to
12 the whole line of questioning.

13 BY MR. KARAGANIS:

14 Q. Mr. Boice --

15 MR. TENENBAUM: I should add for the record
16 that that post-it is not going to -- very well
17 may not be maintained with that box.

18 MR. KARAGANIS: Mr. Tenenbaum, if you
19 remove this, I am going to seek sanctions for
20 attempting to tampering with evidence. You
21 keep this stamp, you keep this post-it on the
22 box, because --

23 MR. TENENBAUM: Now that you have taken
24 that position, I am going to have to insist

1 that the label be removed, it is defacing
2 government property.

3 We did not give you permission to put
4 that label on.

5 BY MR. KARAGANIS:

6 Q. Mr. Boice, directing your attention to
7 a box that has a post-it label, "Midco I and
8 II," with a parenthesis 1-3/3 and 1-2/2, update
9 number 2 all volumes," is that your
10 handwriting?

11 A. No.

12 Q. Whose handwriting is it?

13 A. Pete Moore.

14 Q. Okay.

15 Would you put this.

16 MR. BERMAN: I object. I object to the
17 whole thing.

18 I think we are going to take a break
19 and go off the record. We will go out and talk
20 about it.

21 MR. KARAGANIS: It is my deposition.

22 MR. BERMAN: I don't care.

23 I am sorry, Mr. Karaganis. You are
24 turning this into a show and we need to talk

1 about it, and make proper arrangements so this
2 can be handled properly.

3 We don't have to sit here and put up
4 with your bullying tactics. Now we are going
5 to go out and talk about it, and do it right.
6 That's right. And you are pushing and --

7 MR. KARAGANIS: Mr. Berman, go --

8 MR. BERMAN: -- go out and do it right and
9 arrange it properly.

10 MR. KARAGANIS: Off the record.

11 (Whereupon a short recess was had.)

12 MR. KARAGANIS: Let's go on the record.

13 Mr. Sheldon and others want to make a
14 comment. Harvey.

15 MR. SHELDON: I am not sure that we have
16 reached an agreement about the ability to mark
17 these copies. We are about to take a lunch
18 break.

19 I just thought it appropriate to note
20 that Standard T's notice of deposition
21 requested all documents relevant to Midco
22 decisions or the Midco case, several of its
23 aspects, all of its aspects. And those include
24 not only documents on the record, but documents

1 that may be in Mr. Boice's possession in his
2 official duties.

3 And since we are going to take a lunch
4 break, I thought it appropriate to make that
5 point now, so that Mr. Boice has an opportunity
6 to produce those documents as well pursuant to
7 Standard T's notice.

8 MR. TENENBAUM: Let me respond.

9 I don't know what documents you are
10 referring to. But, as we have indicated in our
11 objections and have indicated to you going back
12 to January, that to the extent you are seeking
13 documents outside the record-review issues, you
14 are not entitled to them under the law, without
15 an appropriate showing and court order.

16 MR. KARAGANIS: Let's go back to the
17 question of the record.

18 Just very quickly, it is imperative
19 for us to identify what constitutes the
20 administrative record, and its consistency with
21 the various indices that the government says
22 are the index to the record.

23 Parenthetically, the government has
24 repeatedly referred to the fact that they

1 served a certified index on the court and
2 parties sometime last week. We have yet to
3 receive that.

4 In order to make sure that the
5 physical documents, at a minimum, conform to
6 the so-called certified index, it is imperative
7 that we go through the certified index and the
8 documents and be in a position to mark those
9 documents in terms of their conformance as
10 deposition exhibits, so that there is a record
11 made of the conformance of the documents to the
12 certified index.

13 We have asked the government to do
14 that. The government has refused. The
15 government has talked about coming up with true
16 and accurate copies, which they are prepared to
17 certify, I take it, that they are true and
18 accurate copies of the administrative record.

19 We object to that as being a very
20 costly process, but if that is the only way to
21 go forward on that, we will consider it.

22 And as to that, we are concerned that
23 the copy quality of the so-called record itself
24 is very poor, and we are concerned that any

1 attempt to copy that badly duplicated record
2 already will result in a number of documents
3 being virtually unreadable.

4 Many of the documents that are in the
5 so-called record are already unreadable. And
6 we would ask the government to reconsider its
7 refusal to allow them to be marked as exhibits.

8 We reserve the right to seek relief
9 from the court and we will recess this
10 deposition at this hour until 1:30, so that we
11 can have an opportunity to review the documents
12 during the noon hour.

13 MR. TENENBAUM: I do need to respond to
14 that remark.

15 That doesn't really correctly state
16 the government's position at all.

17 The government's position on this is
18 that the certification of the record and the
19 indices of the record is a matter which is done
20 by the court, not by a deposition.

21 The indices have already been
22 previously certified to the court, according to
23 which the docket clerk's indication of the
24 court's preference was that the indexes be

1 certified rather than the entire physical
2 boxes.

3 We are prepared at any time, any
4 reasonable time, to certify to the court by
5 motion the full physical boxes, the documents
6 themselves, if that is what the defendants wish
7 us to do.

8 MR. KARAGANIS: It is --

9 MR. TENENBAUM: If I may --

10 MR. KARAGANIS: I am sorry.

11 MR. TENENBAUM: -- continue.

12 I don't know what documents counsel is
13 referring to as poor copy quality, but we have
14 bent over backwards to be willing and have
15 indicated our willingness to enter into any
16 arrangements that counsel wants with respect to
17 the copying. Any reasonable arrangements that
18 counsel wants with respect to the copying of
19 the administrative record.

20 To the extent that counsel is seeking
21 to do this by deposition exhibit, we continue
22 to believe that that is highly improper and
23 irregular and is not the way that
24 administrative record cases are handled.

1 And that is the basis for our
2 objection to their doing this in this fashion.

3 But, I continue to reiterate our
4 willingness to work out whatever arrangements
5 may be needed to make sure that all counsel
6 that desire the best quality copies needed can
7 obtain such copies.

8 MR. FORT: Mr. Tenenbaum, you have
9 indicated and congratulated yourself on your
10 willingness to assist.

11 You have indicated that you were ready
12 to ship these boxes off to the court. What
13 would have been left in the document repository
14 here then?

15 MR. TENENBAUM: As I indicated, we would be
16 willing to certify the physical records, the
17 boxes to the court, upon reasonable time which
18 would enable us to make any necessary
19 arrangements, if necessary, to make any
20 additional copy for public review at the EPA's
21 offices, so that an addition copy could be
22 examined.

23 MR. SHELDON: Mr. Tenenbaum, the court
24 reporter is authorized to act to preserve

1 documents for the court as an officer of the
2 court, as are each of the attorneys present
3 officers of the court.

4 And it would seem to be unnecessary
5 and very costly delay to require documents to
6 be somehow sent physically to Hammond, when we
7 have after all this time and these
8 long-standing requests for presentation of a
9 witness and the record, asked for it here
10 today.

11 I strenuously object to the need for
12 such an outlandish procedure. I would object
13 to the cost that it imposes, and I believe that
14 there is a more facilitative way to simply get
15 this copied and have it marked, which is simply
16 the straightforward way Mr. Karaganis proposed
17 originally.

18 But, any other way is certainly
19 preferable than sending something to Hammond
20 and delaying. There must be twenty lawyers in
21 this room.

22 MR. FORT: We join in those remarks and
23 object to this suggestion that the only way to
24 handle these documents is by sending them to

1 the court.

2 All these notices for depositions, Mr.
3 Sheldon's in particular, and the other Rule 30
4 (b) 6 notices have asked for documents as well
5 as individuals.

6 Your answer with respect to Mr. Roice
7 has been repeatedly it is in the administrative
8 record. Now you are precluding us from having
9 any identification by a live witness of the
10 administrative record.

11 These boxes don't speak, sir, and they
12 don't speak and we cannot have a Rule 30 (b) 6
13 deposition without these documents.

14 MR. TENENBAUM: If anything --

15 Apparently you are not comfortable and
16 not at ease with the process for administrative
17 review of administrative decisions in courts.

18 If anything is outlandish, is the two
19 last statements that were made.

20 As you know, these documents were
21 brought here subject to our objection. We
22 objected to bringing them here and apparently
23 you tried to take advantage of our having
24 brought them here subject to objection.

1 MR. FORT: I never heard that you objected
2 to bringing documents, sir.

3 MR. TENENBAUM: The objection was stated on
4 the record, that this is not the way to handle
5 it.

6 MR. KARAGANIS: What is the basis of your
7 objection?

8 MR. TENENBAUM: It has been stated on he
9 record.

10 MR. KARAGANIS: What is the basis? What is
11 the legal basis of your objection, sir?

12 MR. TENENBAUM: I am not going to engage in
13 a legal dialogue any more than to the extent
14 that I already have. I previously stated the
15 basis for the objection.

16 MR. KARAGANIS: Mr. Tenenbaum, I have never
17 heard you until this morning state that you
18 have a basis for objecting to identifying the
19 administrative record through a deposition
20 exhibit process.

21 MR. TENENBAUM: Yes, I did at the first
22 time that you began your questioning.

23 MR. KARAGANIS: What is the legal basis for
24 that objection, sir?

20

1 MR. TENENBAUM: The basis for that
2 objection is that you are not entitled to take
3 discovery into the administrative record absent
4 a proper showing to the court.

5 MR. KARAGANIS: We just want to find out
6 about its existence, sir.

7 MR. TENENBAUM: I have made a response to
8 the last three or four comments. The
9 administrative record has been available for
10 your review, you have reviewed it.

11 MR. KARAGANIS: On the contrary, sir, the
12 documents that you have brought with you today
13 disclose the presence of documents that have
14 not been previously revealed to lawyers in this
15 room or to their legal assistants.

16 You have been stuffing the
17 administrative record with additional documents
18 and we believe that it is the appropriate
19 subject of inquiry to define what the
20 administrative record is.

21 We are preaching to each other and not
22 resolving anything. I would suggest we recess
23 until 1:30.

24 MR. FORT: Mr. Tenenbaum, I would like to

1 know where on the record you have objected to
2 documents being produced?

3 I just looked at your objections that
4 you gave us this morning, which hadn't been
5 served until then, and I cannot find any place
6 where you have objected to production of
7 documents that are in the administrative
8 record. I don't see it.

9 MR. TENENBAUM: Yes, we have.

10 We have general objection number 2 on
11 page 2. We have in the general objection,
12 objected to any request for designation or
13 production, that seeks information or documents
14 relating to selection of remedial action.

15 MR. KARAGANIS: Farther on you say
16 discovery outside the administrative record.
17 There is the administrative record.

18 We are trying to get the
19 administrative record. We are not trying to go
20 beyond these nine boxes.

21 MR. TENENBAUM: The objection is twofold.

22 You may not take discovery outside of
23 the administrative record, nor may you take
24 discovery as to the compilation of the

1 administrative record absent --

2 MR. KARAGANIS: Let's recess until 1:30.

3 MR. KEATING: I have an objection. Can I
4 put mine in if everyone is done. Maybe no one
5 will talk while I am doing it.

6 We believe that the index has been
7 compiled incorrectly. And we believe that
8 these documents do not support the index, and
9 that we wish to review them during the
10 deposition to show that our belief is correct
11 for the court.

12 Thank you.

13 MR. TENENBAUM: May I respond.

14 The appropriate way to deal with a
15 situation like that -- we have no reason to
16 believe that you are correct, but we are
17 effectively willing to discuss it with you --
18 is for you to give us a call and point out the
19 problem that you foresee and see if we can
20 resolve the problem for you.

21 If we are unable to resolve it, the
22 appropriate way to resolve it, then, is to seek
23 the court to resolve the problem and to ask the
24 court that you be permitted to take discovery,

1 because you believe you are entitled to it for
2 that reason, and we will respond.

3 MR. SHELTON: Just for the record, Standard
4 T -- although it may be in this morning's mail,
5 I haven't checked it yet -- has not received a
6 certified copy of the index.

7 I may wish to join my brother Keith's
8 objection for the record.

9 I would surmise from what I have heard
10 that there is some discrepancy and we would
11 like to establish it.

12 I know that I myself was over there,
13 albeit not extensively, but was shown fewer
14 boxes than these as being the Midco record
15 about or shortly after the time that the 106
16 orders were issued.

17 So, I am curious as to what is or is
18 not in the record.

19 MR. KARAGANIS: Absent any further
20 objections, we are recessed until 1:30.

21 (Whereupon the deposition was
22 recess until 1:30 o'clock p.m. of
23 the same day.)
24

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MIDWEST SOLVENT RECOVERY INC.;
MIDWEST INDUSTRIAL WASTE DISPOSAL
COMPANY, INC.; INDUSTRIAL TECTONICS,
INC.; V & E CORPORATION; ERNEST DE
HART; EDWARD D. CONLEY; HELGA C.
CONLEY; LOVIE DE HART; CHARLES A.
LICHT; DAVID E. LICHT; DELORES LICHT;
EUGENE KLISIAK; JEANETTE KLISIAK;
LUTHER G. BLOOMBERG; ROBERT J. DAW-
SON, JR.; JOHN MILETICH; MARY
MILETICH; PENN CENTRAL CORPORATION;
INSILCO CORPORATION; RUST-OLEUM, INC.;
ZENITH RADIO CORPORATION; STANDARD T
CHEMICAL COMPANY, INC.; AMERICAN CAN
COMPANY, INC.; PRE FINISH METALS, INC.;
PREMIER COATINGS, INC.; MOTOROLA, INC.;
and DESOTO, INC.;

Defendants.

AMERICAN CAN COMPANY, INC.,
DESOTO, INC., INSILCO CORPORATION,
MOTOROLA, INC., PRE FINISH METALS,
INC., PREMIER COATINGS, INC.,
RUST-OLEUM, INC., STANDARD T
CHEMICAL COMPANY, INC.,
ZENITH RADIO CORPORATION, JOHN
MILETICH, MARY MILETICH and THE
PENN CENTRAL CORPORATION,

Third-Party Plaintiffs,

vs.

ACCUTRONICS, ACTIVE SERVICE CORP.,
AMERICAN NAMEPLATE & DECORATING CO.,

) Civil Action
) No. H-79-556
) Third-Party
) Complaint

1	AMERICAN PRINTER & LITHOGRAPHER CO.,)
	AMERICAN RIVET COMPANY, APECO,)
2	APPROVED INDUSTRIAL REMOVAL, INC.,)
	ARMOUR PHARMACEUTICAL, ARTISAN HAND)
3	PRINTS, ASHLAND CHEMICAL CO.,)
	AVENUE TOWING COMPANY, BARR &)
4	MILES, INC., BELDEN ELECTRICAL)
	PRODUCTS DIV. OF COOPER INDUSTRIES,)
5	INC., BRETFOED MANUFACTURING, INC.,)
	BUTLER SPECIALTY COMPANY, INC.,)
6	BY PRODUCTS MANAGEMENT, CALUMET)
	CONTAINER, CARGILL, INC.,)
7	CHEMALLOY DIVISION OF FISHER- CALO)
	CHEMICAL CO., CHICAGO ETCHING CORP.,)
8	CHICAGO NAMEPLATE COMPANY,)
	CHICAGO ROTOPRINT CO.,)
9	C & C INDUSTRIAL MAINTENANCE CORP.,)
	CITY OF GARY, INDIANA, C.P. CLARE)
10	DIVISION OF GENERAL INSTRUMENTS)
	CORP., C.P. HALL CO.,)
11	C.P. INORGANICS, COMMANDER PACKAGING,)
	CONNOR FOREST INDUSTRIES, CONSERVA-)
12	TION CHEMICAL, CONSUMERS PAINT)
	FACTORY, INC., CONTINENTAL)
13	WHITE CAP DIVISION OF CONTINENTAL)
	CAN COMPANY, CONVERSIONS BY GERRING,)
14	COUNTY OF DU PAGE, ILLINOIS,)
	CRONAME, INC., CROWN CORK & SEAL)
15	CO., INC., CULLIGAN INTERNATIONAL)
	COMPANY, CULLIGAN WATER CON-)
16	DITIONING, INC., FRANK J. CURRAN,)
	CUSTOM METALS PROCESSING,)
17	DAP, INC. OF BEECHAM COSMETICS,)
	DAUBERT CHEMICAL COMPANY,)
18	DEUBLIN COMPANY, DOBSON CONSTRUCTION)
	INC., DUO FAST CORPORATION, DU-TONE)
19	CORP., HAROLD EGAN, EKCO HOUSEWARE)
	CO., EL-PAC, INC., EMBOSOGRAPH DIS-)
20	PLAY MFG. CO., ESS KAY ENAMELING, INC.,)
	ETHICON, INC., FELT PRODUCTS MFG. CO.,)
21	FLINT INK CORP., FURNAS ELECTRIC)
	CO., GEARMASTER DIVISION, EMERSON)
22	ELECTRIC, THE GILBERT & BENNETT)
	MFG. CO., GLD LIQUID DISPOSAL,)
23	HENRY PRATT COMPANY, J.M. HUBER)
	CORPORATION, HYDRITE CHEMICAL CO.,)
24	INTAGLIO CYLINDER SERVICE, INC.,)

1 JOHNSON & JOHNSON, J & S TIN MILL)
 PRODUCTS, KNAACK MFG. CO., LANSING)
 2 SERVICE CORPORATION, LAUTTER)
 CHEMICAL, LIQUID DYNAMICS,)
 3 LIQUID WASTE, INCORPORATED,)
 STEVE MARTEL, MASONITE CORPO-)
 4 RATION, McWHARTER CHEMICAL CO.,)
 METAL RECLAIMING CORPORATION,)
 5 METROPOLITAN CIRCUITS,)
 MIDWEST RECYCLING COMPANY, MONTGOMERY)
 6 TANK LINES, MORTON THIOKOL INC.,)
 MR. FRANK, INC., NAMSCO, INC.,)
 7 NATIONAL CAN CORPORATION, NAZ-DAR CO.,)
 NUCLEAR DATA, INC., PPG INDUSTRIES,)
 8 INC., PASLODE COMPANY, PIERCE & STEVENS)
 CHEMICAL CORP., PIONEER PAINT PRODUCTS,)
 9 PREMIER PAINT CO., PYLE-NATIONAL CO.,)
 R-LITE, REFLECTOR HARDWARE CORP.,)
 10 REGAL TUBE, RELIANCE UNIVERSAL, INC.,)
 RICHARDSON GRAPHICS, JOHN ROSCO,)
 11 ROZEMA INDUSTRIAL WASTE, ST. CHARLES)
 MANUFACTURING, SCHOLLE CORPORATION,)
 12 SCRAP HAULERS, SHERWIN WILLIAMS)
 COMPANY, SIELD COATINGS, INC.,)
 13 SIZE CONTROL COMPANY, SKIL CORPORA-)
 TION, SPECIAL COATINGS CO.,)
 14 SOUTHERN CALIFORNIA CHEMICAL,)
 SPECIALTY COATINGS, INC.,)
 15 SPOTNAILS, INC., STAR TRUCKING, STERN)
 ELECTRONICS, INC., JOE STRAUSNICK,)
 16 STUART CHEMICAL & PLANT, INC.,)
 SUMMER & MACE, SUN CHEMICAL,)
 17 SYNTECH WASTE TREATMENT CENTER,)
 T.R.C., TEEPACK, INC., ALFRED TENNY,)
 18 THIELE-ENGDAHL, INC., THOMPSON)
 CHEMICALS, TIFFT CHEMICALS,)
 19 TOUNEY DISPOSAL, TRIPLE S. ETCHANTS,)
 UNIROYAL, INC., UNITED RESIN AD-)
 20 HESIVES, INC., U.S. ENVELOPE, U.S.)
 SCRAP AND DRUM, U.S. STEEL CORP., UNI-)
 21 VERSAL RESEARCH LABORATORIES, INC.,)
 UNIVERSAL TOOL & STAMPING COMPANY,)
 22 VANDER MOULEN DISPOSAL, VELSICOL)
 CHEMICAL CORP., VICTOR GASKET)
 23 DIVISION OF DANA CORPORATION,)
 WARNER ELECTRIC BRAKE & CLUCH CO.,)
 24 WARWICK CHEMICAL, WASTE RESEARCH &)

RECYCLING, XEROX CORPORATION, and)
other unidentified persons,)
)
Third-Party Defendants.)

DEPOSITION OF
RICHAD E. BOICE

June 5, 1990

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The continued deposition of RICHARD EDWIN
BOICE, called for examination by the Defendants,
pursuant to notice and pursuant to the provisions
of the Federal Rules of Civil Procedure of the
United States District Courts, pertaining to the
taking of depositions for the purpose of
discovery, taken before Arnold N. Goldstine, a
Notary Public and Certified Shorthand Reporter
within and for the County of Cook and State of
Illinois, at 227 West Monroe Street, on June 6,
1990, commencing at the hour of 1:30 o'clock p.m.

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-and-

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-and-

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appeared on behalf of
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McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096

-and-

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APPEARANCES (CONTINUED):

Mr. James J. Kupka
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appeared on behalf of
J & S Tin Mill Products Company,
Inc., et al.;

Mr. Bradley L. Williams
Ice, Miller, Donadio & Ryan
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Indianapolis, Indiana 46282

appeared on behalf of
Indiana Department of Highways.

1 MR. KARAGANIS: Let the record show that
2 this is the resumption after luncheon recess of
3 the 30 (b) 6 deposition, and specifically named
4 notice deposition of Mr. Richard Boice.

5 Mr. Reporter, would you mark the
6 following documents as Boice Deposition Exhibit
7 No. 3, please.

8 MR. TENENBAUM: Joe, apparently the
9 reporter has not put a label on the two
10 exhibits I asked be marked.

11 If you want to label them 4 and 5, he
12 has them. I would like to label the objections
13 that we have been discussing all day as Exhibit
14 4 and the motion for protective order Exhibit
15 5.

16 (The documents above-referred to
17 were marked Boice Deposition
18 Exhibit Nos. 3, 4 and 5, respectively,
19 for identification.)
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1 RICHARD EDWIN BOICE

2 having been previously duly sworn,
3 was examined and testified further as follows:

4 DIRECT EXAMINATION

5 CONTINUED

6 BY MR. KARAGANIS:

7 Q. Mr. Boice, directing your attention to
8 what has been marked as Boice Deposition
9 Exhibit No. 3.

10 Would you please state what that
11 document purports to be?

12 A. The first page is a certification of
13 documents comprising the administrative
14 records.

15 Q. I am sorry.

16 The document says, "Certification of
17 documents comprising the administrative
18 record."

19 Is that a typographical error, did you
20 mean "record"?

21 A. I think it should be "records."

22 Q. Plural?

23 A. I guess there is different records
24 from Midco I and Midco II.

1 Q. Are there also different records for
2 the 106 orders for Midco I and II?

3 A. Those incorporate the Midco I and
4 Midco II record of decision records.

5 Q. So the Midco I Section 106
6 administrative order has documents in its
7 administrative record in addition to those in
8 the Midco I record of decision; is that
9 correct?

10 MR. TENENBAUM: My prior objection
11 established -- let me reiterate my earlier
12 objections, but you may go ahead and answer.

13 BY MR. KARAGANIS:

14 Q. Please answer.

15 A. What was the question?

16 Q. Please read the question back.

17 (The record was read.)

18 Let me restate the question.

19 Is it not correct, Mr. Boice, that the
20 documents in the administrative record for the
21 Midco I section 106 administrative order are
22 documents that include the Midco I record of
23 decision administrative index or administrative
24 record, plus some additional documents?

1 A. That's correct.

2 MR. TENENBAUM: Same objection.

3 MR. KARAGANIS: Thank you.

4 Q. So, then, would it be fair to say from
5 the standpoint of administrative records,
6 directing your attention to Boice Deposition
7 Exhibit No. 3, there is an administrative
8 record for the Midco I record of decision dated
9 June 30, 1989?

10 A. That's correct.

11 Q. There is a separate administrative
12 record for the Midco II site record of decision
13 dated June 30, 1989; is that correct?

14 A. That's correct.

15 Q. And there is a separate administrative
16 record for the Section 106 administrative order
17 for the Midco I site dated December 29, 1989;
18 is that correct?

19 A. That's correct.

20 Q. There is a separate administrative
21 record for the Section 106 administrative order
22 for the Midco II site at Gary, Indiana,
23 December 29, 1989; is that correct?

24 A. That's correct.

1 MR. TENENBAUM: Same objections to this
2 whole line of questioning.

3 BY MR. KARAGANIS:

4 Q. Now, Mr. Boice, directing your
5 attention to the boxes that you brought with
6 you today, you had previously said that there
7 were, I believe, six boxes that contained
8 materials that may would comprise the
9 administrative record for item number 1 on
10 Boice Deposition Exhibit No. 3, namely the
11 response action for the Midco I site record of
12 decision June 30, 1989; is that correct?

13 A. You mean separate out all the other
14 documents?

15 Q. Did you not earlier testify that there
16 were six boxes that contained Midco I
17 administrative record documents for the Midco I
18 record of decision?

19 A. That's correct.

20 MR. TENENBAUM: Can I have a continuing
21 objection, so I don't have to object to each
22 question?

23 MR. KARAGANIS: Sure.

24 MR. TENENBAUM: Thank you.

1 BY MR. KARAGANIS:

2 Q. Mr. Boice, with respect to the
3 administrative record for the Midco I site
4 record of decision dated June 30, 1989, would
5 you identify and please initial on Boice
6 Deposition Exhibit No. 3 the indices that
7 relate and identify the documents in the Midco
8 I record of decision June 30, 1989
9 administrative record?

10 A. Each page?

11 Q. Each page, please. Put your initials
12 on each page.

13 A. That will take a little long.

14 O. Please identify them as "Midco I
15 R.O.D."

16 MR. TENENBAUM: To save time, I am going to
17 allow the witness to do this, subject to my
18 continuing objections to this process.

19 A. Initial it, each page?

20 MR. KARAGANIS: Please.

21 MR. TENENBAUM: This is not the way to
22 proceed on the record of your case, but in
23 order to save time I'm not going to instruct
24 the witness not to do this.

1 I do object to the whole process, any
2 use thereof of it.

3 MR. KARAGANIS: Take your time, you have
4 plenty of time.

5 O. For the record, so there is no dispute
6 later, at a page which is marked page number 1
7 of the Boice Deposition Exhibit 3, the a page
8 entitled, "Administrative record index update
9 3, documents for unilateral administrative
10 order, Midco I," Mr. Boice had indicated that
11 was part of the Midco I R.O.D. and subsequently
12 crossed that out. Is that correct, Mr. Boice?

13 A. That's correct.

14 (The record was read.)

15 Q. Mr. Boice, directing your attention to
16 Boice Deposition Exhibit No. 3, directing your
17 attention to a category of documents that have
18 the category of index, that is entitled, "Midco
19 I liability documents."

20 Are those part of the administrative
21 record for the response action for the Midco I
22 site Gary, Indiana record of decision, June 30,
23 1989?

24 A. No. No.

1 Those are part of the record for the
2 unilateral administrative order.

3 Q. Okay.

4 Would you now please mark, directing
5 your attention to item number 2 in Boice
6 Deposition Exhibit 3, the items that comprise
7 the administrative record for the -- strike
8 that.

9 Directing your attention to item
10 number 3 on Boice Deposition Exhibit No. 3,
11 would you identify the documents and index
12 pages which identify the documents in the
13 administrative record for item number 3,
14 Section 106 administrative order for Midco I,
15 Gary, Indiana, December 29, 1989?

16 Please do so by indicating that it is
17 the Midco I, 106, put the legend "Midco I 106"
18 and your initials, please.

19 MR. TENENBAUM: Same objection.

20 Joe, how do you want him to handle it
21 if there are any pages in which some of the
22 page is in one and some of the page is in the
23 other?

24 MR. KARAGANIS: If there is a dual page, he

1 can simply add on the legend.

2 MR. TENENBAUM: I am saying if part of the
3 page is one and part is the other and part is
4 both?

5 MR. KARAGANIS: He should mark it.

6 A. I am supposed to initial each of
7 these.

8 O. Please.

9 MR. TENENBAUM: He wants you not to do this
10 just page by page.

11 MR. KARAGANIS: Yes, I do.

12 MR. TENENBAUM: Not just page by page and
13 also item-by-item?

14 MR. KARAGANIS: No. If there are items
15 that are part of another administrative record,
16 he can so indicate.

17 MR. TENENBAUM: Right. You have to look at
18 it not just the page as a whole, you have to
19 look at each item.

20 MR. KARAGANIS: If there are any.

21 MR. TENENBAUM: Make sure you are
22 indicating it correctly for each item on the
23 page.

24 MR. KARAGANIS: We will give him more than

1 enough opportunity to review this document
2 after he hs completed it.

3 A. Can I talk to you for a moment?

4 Q. I am conducting my examination.

5 If you need a recess at some point in
6 the future, fine. But I would prefer if you
7 did not interrupt your testimony with
8 consultation with counsel while I am in the
9 middle of identifying a document.

10 MR. TENENBAUM: Do you understand your
11 instructions?

12 A. Yes.

13 I think to some extent these should be
14 in the R.O.D. record also.

15 BY MR. KARAGANIS:

16 Q. I am sorry. Are they or aren't they?

17 Do you want to just tell me right now,
18 have you identified the liability documents as
19 being part of the Midco I administrative record
20 for the record of decision dated June 30, 1989?

21 Please answer my question?

22 MR. TENENBAUM: I don't want any
23 explanation.

24 I am instructing you not to give an

1 explanation of why something is in the record.
2 It is not permissible.

3 MR. KARAGANIS: There is an outstanding
4 question.

5 Please read the question back and I
6 would ask the witness to answer it.

7 (The record was read.)

8 A. Yes.

9 Q. When did you first identify the Midco
10 I liability documents as being part of the
11 administrative record for the record of
12 decision dated June 30, 1989?

13 MR. TENENBAUM: Objection, instruct the
14 witness not to answer.

15 There has been no showing made as to a
16 need for discovery into the compilation of the
17 record. There is no court order permitting you
18 to discovery.

19 MR. KARAGANIS: Mr. Tenenbaum, facts will
20 show that the first time he included the
21 liability documents as part of the Midco I
22 administrative record for the record of
23 decision of June 30, 1989 was on June 5, 1990
24 right here, because we have asked for the

1 administrative record repeatedly.

2 MR. TENENBAUM: For the record, you have
3 asked for the administrative record --

4 MR. KARAGANIS: We have asked for the
5 administrative record for the Midco I record of
6 decision of June 30, 1989.

7 And at no time do you identify as part
8 of that record the liability documents.

9 MR. TENENBAUM: The liability documents are
10 included in this packet.

11 MR. KARAGANIS: I have asked him to
12 identify what is in the administrative record.

13 MR. TENENBAUM: I don't know what request
14 you are referring to.

15 I do know you need a court order
16 before you are entitled to discovery into the
17 compilation of the record.

18 MR. KARAGANIS: I am trying to find out
19 which record we are dealing with here, Mr.
20 Tenenbaum.

21 MR. TENENBAUM: I have objected to this
22 entire process for just this reason. This is
23 not the format for looking into the contents of
24 the record.

1 MR. KARAGANIS: It is obvious, you have
2 should have field four administrative records.

3 MR. TENENBAUM: There is nothing is obvious
4 at all.

5 MR. KEATING: My objection is that we
6 believe that the index was incorrectly compiled
7 and that these records will show that the index
8 was incorrectly compiled at any time, up until
9 and including today.

10 And that is why we would like to know
11 what is in the record.

12 MR. TENENBAUM: You believe the index,
13 there is something incorrect about it?

14 MR. KARAGANIS: Yes.

15 MR. TENENBAUM: The simple thing to do is
16 send us letter and we will see whether there is
17 something incorrect about the index.

18 MR. KEATING: We are doing that today by
19 deposition. That is my objection.

20 MR. TENENBAUM: That's not permissible.

21 This is not the type of thing that you
22 can do on the cuff of your pants and make a
23 decision as to -- as to what you can take
24 testimony at a deposition on something that you

1 look at, not do it by deposition, not without
2 appropriate court order under the
3 circumstances.

4 MR. KEATING: We believe that is incorrect,
5 Mr. Tenenbaum, and would ask you to avoid
6 instructing the witness as to how to prepare
7 his answers.

8 MR. TENENBAUM: I am just telling the
9 witness to take his time in answering, I am not
10 instructing the witness.

11 MR. FORT: Excuse me, Mr. Tenenbaum. I
12 can't hear the remarks.

13 MR. TENENBAUM: My instructions to the
14 witness --

15 MR. KEATING: I don't think he needs any
16 instruction. If he takes any more time we will
17 be old.

18 MR. TENENBAUM: This is a highly irregular
19 procedure and he will take all the time he
20 needs.

21 If we get these kinds of attitudes to
22 questions, we will just bring the whole matter
23 to the court and let the court rule on it.

24 Our position is this is not a

1 legitimate form of discovery, and we are trying
2 to be cooperative and expedite matters.

3 If you guys are going to respond in
4 the kind of manner that we have seen so far, we
5 just may cut it off and let the court rule.

6 BY MR. KARAGANIS:

7 O. Are you finished, Mr. Boice?

8 A. Yes.

9 Q. Now, to give you a breather on your
10 writing your initials, let's see if we can
11 identify the documents that comprise the
12 administrative record for item number 1 on
13 Boice Deposition Exhibit No. 3, namely the
14 response action for the Midco I site at Gary,
15 Indiana record of decision June 30, 1989.

16 You indicated previously that --

17 A. Didn't I just do that?

18 Q. You have identified sheets on the
19 index, now I am asking you to physically
20 identify the documents.

21 You previously identified six boxes
22 which you said contain items that were in the
23 Midco I administrative record for the June 30,
24 1989 record of decision.

1 Would you please identify what those
2 documents are?

3 A. I don't understand the question.

4 Q. Would you physically show me the
5 documents?

6 MR. TENENBAUM: Joe, if you want a
7 particular document, tell him what you want.

8 I am not going to waste all these
9 attorneys' time here in having him pull out
10 thousands of documents.

11 MR. KARAGANIS: There are not thousands of
12 documents. We have six boxes, some of which
13 contain other things.

14 MR. TENENBAUM: I am sorry.

15 I am not going to waste all these
16 attorneys' time in an exercise in futility
17 here.

18 If you want to examine a specific
19 document --

20 MR. KARAGANIS: I want to examine him with
21 respect --

22 MR. TENENBAUM: -- that would be one thing.

23 MR. KARAGANIS: I want to examine him with
24 respect to the contents of the record, items in

1 the record, not the specifics of the items,
2 just the items in the record, to physically
3 identify what they are.

4 MR. TENENBAUM: I think we have gone as far
5 as we are going to -- I am going to allow him
6 to go on that at this point.

7 MR. KARAGANIS: Are you instructing the
8 witness not to answer?

9 MR. TENENBAUM: I am instructing the
10 witness not to answer that question, because
11 you have not made the necessary showing to
12 entitle you to take discovery into the contents
13 of the administrative record through a
14 deposition.

15 MR. KARAGANIS: Mr. Tenenbaum, I believe
16 that you are attempting to cover up scrutiny
17 into the existence of items that you have
18 identified in the administrative record.

19 I believe I am allowed and permitted
20 to ask to physically see the documents in the
21 administrative record for Midco I record of
22 decision June 30, 1989.

23 MR. TENENBAUM: You are, and in accordance
24 with the agency's normal procedures are

1 permitted to ask to see any such document
2 through the normal procedures.

3 You are not permitted to do so at a
4 deposition.

5 However, as an accommodation, I may
6 allow subject to objection, the witness to pull
7 a particular document, if that is what you
8 want.

9 But, I will not allow him to sit down
10 and pull thousands of documents and take up
11 valuable time of the agency personnel and of
12 the other attorneys here.

13 MR. KARAGANIS: I believe you are trying to
14 cover up access to the documents, Mr.
15 Tenenbaum, but I will move along in an attempt
16 to --

17 MR. TENENBAUM: You are welcome. I am
18 sorry.

19 MR. KARAGANIS: -- to proceed in the face
20 of your obstruction.

21 MR. TENENBAUM: If I could respond.

22 MR. KARAGANIS: Mr. Tenenbaum.

23 MR. TENENBAUM: Just a second.

24 As I have indicated just now, anything

1 you want to see, we will be glad to cooperate
2 and assist you with, not at a deposition.

3 BY MR. KARAGANIS:

4 Q. Mr. Boice, could you please show me
5 what update 4 is to the Midco I record?

6 I am now talking about the Midco I
7 record of decision in the administrative record
8 of June 30, 1989.

9 Is there more than one volume?

10 A. No, that's all.

11 Q. So with respect to the Midco I record
12 of decision June 30, 1989 administrative
13 record, is it correct that you have handed me a
14 single volume you have identified as update
15 number 4, which is entitled, "USEPA
16 administrative record update number 4, Midco I
17 Gary, Indiana, with documents for unilateral
18 administrative order dated May, 1990"?

19 A. That is what I have given you here.

20 Q. When was update number 4 available for
21 for public inspection?

22 MR. TENENBAUM: Objection. Instruct the
23 witness not to answer.

24 MR. KARAGANIS: What is the grounds, sir?

1 MR. TENENBAUM: You have not made any
2 showing that entitles you to take discovery on
3 the composition of the record.

4 BY MR. KARAGANIS:

5 Q. Is the document that I have just
6 identified, namely the green covered document
7 entitled, "USEPA administrative record update
8 number 4 Midco I Gary, Indiana with documents
9 for unilateral administrative order May 1990,"
10 a part of the administrative record for the
11 Midco I record of decision June 30, 1989?

12 A. Yes.

13 Q. All right.

14 Mr. Tenenbaum, I will say that you as
15 an officer of the court made a representation
16 to the court that the administrative record was
17 available for review.

18 The first time any of our people have
19 been able to see update number 4 was today.
20 Are you retracting your previous statement to
21 the court?

22 MR. TENENBAUM: I am sorry, I did not
23 follow that at all.

24 What was your point?

1 MR. KARAGANIS: In your previously pleading
2 to the court, the Department of Justice has
3 said the administrative record for Midco I was
4 available for inspection to the parties.

5 I will say as an officer of the court
6 that neither I, nor my staff, nor staff of
7 other defendants' counsel have been able to see
8 what has been marked as update number 4 to the
9 Midco I record of decision until today, when it
10 was first disclosed.

11 Now, are you staying by the
12 representation you made to the court?

13 MR. TENENBAUM: I am perfectly -- I am not
14 here today to enter into a legal debate about
15 this.

16 MR. KARAGANIS: No. It is a question of
17 the truth or accuracy of a representation made
18 to the court, Mr. Tenenbaum.

19 MR. TENENBAUM: May I finish.

20 I will be perfectly glad to enter into
21 any appropriate stipulation after I have had a
22 chance to investigate the factual correctness
23 of whenever that volume was available for
24 review.

1 I will be glad to enter into a correct
2 stipulation with you on that, but I am not
3 going to do it today.

4 MR. KARAGANIS: Mr. Tenenbaum, that is my
5 question to this witness, when it was available
6 for public view.

7 Are you instructing the witness not to
8 not to give truthful testimony with respect to
9 that issue?

10 MR. TENENBAUM: Well, if I instruct the
11 witness, it is not going to be on the grounds
12 that he shouldn't give truthful testimony,
13 beyond a valid objection.

14 MR. KARAGANIS: I don't want to disturb
15 your concentration, Mr. Tenenbaum, but are you
16 going to instruct the witness to answer or not
17 to answer?

18 MR. TENENBAUM: Well, subject to my
19 objections, if the witness knows when this
20 particular folder was first available for
21 public review, I'll allow him to answer, if he
22 knows.

23 BY MR. KARAGANIS:

24 Q. Directing your attention again to

5
1 USEPA administrative record update 4, Gary,
2 Indiana, the documents for unilateral
3 administrative order, when were these documents
4 first included in the administrative record for
5 the Midco I R.O.D. dated June 30, 1989 and made
6 available for public inspection as part of that
7 administrative record?

8 MR. TENENBAUM: That's compound.

9 First, your previous question just
10 asked him when it was available for public
11 review.

12 MR. KARAGANIS: Your objection is noted.

13 Q. Answer the question, please.

14 A. Will you repeat the question?

15 Q. Please repeat the question.

16 (The record was read.)

17 MR. TENENBAUM: Same objection.

18 A. The date on this is May. So it was
19 available in May, sometime in May.

20 BY MR. KARAGANIS:

21 Q. Sometime in May.

22 What date in May of 1990?

23 A. I don't know.

24 Q. And it was May 1990 when these

1 documents were added to the Midco I R.O.D.
2 administrative record; is that correct?

3 A. That's correct.

4 Well, that's right. They were in the
5 record, but we hadn't compiled them yet.

6 Q. So you hadn't compiled them as part of
7 the record; is that correct?

8 A. Right.

9 MR. KEATING: We have a question, please.
10 Was the witness sworn in?

11 MR. KARAGANIS: Yes.

12 MR. KEATING: I had forgotten.

13 BY MR. KARAGANIS:

14 O. Mr. Boice, directing your attention
15 again to the green folder identified as, "USEPA
16 administrative record update number 4, Midco I
17 Gary, Indiana with documents for unilateral
18 administrative order May 1990," it is a long
19 breath. It would be much better as a
20 deposition exhibit.

21 I want to direct your attention to a
22 tab, a pink tab entitled, "memorandum," in
23 which the number at the back of the book is
24 0000001, with the legend, "Bottom portion of

1 this document has been redacted."

2 Directing your attention to the
3 memorandum which is a memorandum dated August
4 23, 1989, did you delete or modify the contents
5 of the document that is shown as an August 23,
6 1989 memorandum from Charles Sutfin to Basil
7 Constantelos?

8 MR. TENENBAUM: I am going to object,
9 direct the witness not to answer.

10 The compilation of the record is not a
11 proper subject of the deposition.

12 MR. KARAGANIS: What is a proper subject of
13 the deposition is intentional withholding and
14 actual alteration of memoranda, Mr. Tenenbaum.

15 There is a strong indication, indeed a
16 presumption, that the document I have just
17 referred to has been deliberately modified by
18 deleting a significant portion of the
19 memorandum.

20 If an original document was so
21 modified by officers or employees of the United
22 States Environmental Protection Agency, that
23 raises some very serious questions as to the
24 integrity and honesty of the record being

1 presented to the court.

2 MR. TENENBAUM: Let's avoid the theatrics,
3 if we can.

4 We have the original of the document,
5 there is no question about the alteration of a
6 document.

7 MR. KARAGANIS: It has been altered?

8 MR. TENENBAUM: There is no question of an
9 alteration of a document.

10 The page you referred to does say
11 bottom portion of this document has been
12 redacted.

13 MR. KARAGANIS: Meaning you took something
14 out.

15 MR. TENENBAUM: Presumably if it has been
16 redacted, it has been redacted for valid
17 reason, such as there is an attorney-client
18 privilege or whatever, some other privilege
19 involved.

20 It is done in accordance with the
21 agency administrative procedures for compiling
22 records. You are not entitled to take
23 discovery into the compilation of this record.

24 MR. KARAGANIS: Mr. Tenenbaum.

1 MR. TENENBAUM: There is no question here
2 of some sort of altercation of an original
3 document.

4 MR. KARAGANIS: It appears from the
5 document that we saw for the first time today,
6 that, either with your instructions or without
7 your instructions, a document has been altered
8 without the proper assertion of an appropriate
9 privilege.

10 MR. TENENBAUM: This is a record document.
11 The record is compiled in accordance with
12 agency procedures.

13 BY MR. KARAGANIS:

14 Q. Mr. Boice, is it not correct that the
15 document dated August 23, 1989 from Charles
16 Sutfin to Basil Constantelos, which is under
17 the tab memorandum in this update number 4, is
18 not a true and accurate copy of the original of
19 that document?

20 MR. TENENBAUM: Again, I am objecting and
21 instructing the witness not to answer.

22 There has been no showing as to a need
23 for discovery into the compilation of the
24 record.

1 MR. KEATING: That's not the question. The
2 question is different.

3 MR. KARAGANIS: Is it different than the
4 original.

5 MR. KEATING: That's not a question about
6 compilation.

7 MR. TENENBAUM: It is the compilation of
8 the record and what is in the record and how it
9 is compiled.

10 MR. KEATING: It is like red and green, are
11 they different colors. He is asking if it is
12 different than the original.

13 MR. TENENBAUM: He is asking about the
14 inclusion of that record document in the record
15 if the form that it was included.

16 MR. KARAGANIS: No, I am not asking about
17 the process. I am asking a simple question,
18 Mr. Tenenbaum, was that document altered.

19 Are you willing to stipulate that the
20 document has been altered?

21 MR. TENENBAUM: I am willing to discuss
22 with you any appropriate stipulation as to
23 the --

24 MR. KARAGANIS: Mr. Tenenbaum somebody,

1 whether it was done with your approval or
2 without, has altered a document.

3 MR. TENENBAUM: The original document is
4 not altered.

5 MR. KARAGANIS: The original document is
6 not in the record. The document in the record
7 has been altered.

8 MR. TENENBAUM: The document in the record
9 indicates that someone has redacted something
10 with respect to a privilege. If you want me to
11 look into it, I will.

12 MR. KARAGANIS: All I understand is when
13 you tell somebody this is the document, it is
14 not the original, and it has been altered, it
15 has been altered intentionally.

16 If you have been a part of it, we
17 ought to make a representation to the court as
18 to the basis for your authorizing such
19 alteration.

20 MR. TENENBAUM: If you want me to look into
21 the circumstances of that particular document,
22 I will be glad to do that for you, and I will
23 send you a letter telling you the reason that
24 the document --

1 Well, subject to my objections, I will
2 send you a letter as to this matter to the
3 extent you are entitled to under the law.

4 BY MR. KARAGANIS:

5 Q. I will ask the question again, Mr.
6 Boice..

7 Directing your attention to document
8 0002, I am sorry, 0001, memorandum from Sutfin
9 to Constantelos, dated August 23, 1989; is that
10 document in any way different than the original
11 of that document?

12 MR. TENENBAUM: Again, we really don't need
13 to waste time on this.

14 I have already indicated our objection
15 and instruction not to answer. I will be glad
16 to brief this issue before the federal court.

17 BY MR. KARAGANIS:

18 Q. Directing your attention to document
19 number 000002 in the same folder entitled,
20 "Telephone memorandum, enforcement
21 confidential, person contacted Jessie Chew,
22 person documenting conversation, Richard
23 Boice."

24 Have you seen this document before?

1 A. Yes.

2 Q. Is that document any different than
3 the original?

4 MP. TENENBAUM: Again, I will reiterate my
5 objections and state for the record my
6 instruction not to answer.

7 And, again, redaction indicates there
8 is a privilege that is applicable.

9 Can I see that for one second?

10 MR. KARAGANIS: Redaction is no statement
11 that there is a privilege applicable.

12 Redaction isn't even a word in the
13 English language to my knowledge. It is an EPA
14 euphemism for slicing up documents, a special
15 course in redaction which is given, Jim.

16 MR. TENENBAUM: That is on the record,
17 right?

18 Is that on the record?

19 MR. KEATING: It is really worse than that.
20 They are down here explaining to me what it
21 means.

22 There is a question pending, right?

23 MR. KARAGANIS: He has instructed him not
24 to answer, Jim.

1 MR. KEATING: As to whether the documents
2 are different?

3 MR. KARAGANIS: That's right.

4 MR. KEATING: It is a preliminary question.

5 MR. KARAGANIS: He instructed the witness
6 not to answer.

7 Q. Mr. Boice, would you pull out the
8 Midco I R.O.D., please, that we identified
9 earlier this morning.

10 Directing your attention to a document
11 which you have previously identified as the
12 Midco I R.O.D. which has got a document number
13 of 00033.

14 Mr. Boice, can you identify on what
15 page it is located in Boice Deposition Exhibit
16 No. 3?

17 MR. TENENBAUM: Same objection.

18 A. The question is?

19 BY MR. KARAGANIS:

20 Q. You are referring to a page that says,
21 "Administrative record index update number 2,
22 Midco I," identified as document number 33 of
23 182 pages; is that right?

24 A. Document 33?

1 Q. Yes.

2 A. 182 pages?

3 Q. That's what I said.

4 Mr. Boice, directing your attention to
5 the Midco I record of decision, there is a
6 table 10, which is in the record of decision.

7 Can you tell me, table 10 appears to
8 be a xerox, where the originals of those tables
9 are located?

10 A. The originals are in the feasibility
11 study prepared by Dames & Moore.

12 Q. Okay.

13 Are they graphs on table 10 --

14 A. Those are tables, not graphs.

15 Q. I am sorry.

16 Are the tables listed in table 10 of
17 the R.C.D. any different than the feasibility
18 study prepared by Dames & Moore?

19 In other words, has it been modified
20 at all?

21 MR. TENENBAUM: Same objection.

22 A. No.

23 BY MR. KARAGANIS:

24 Q. So if I have any difficulty in reading

1 the R.O.D., I can turn to the feasibility study
2 and find more readable copies; is that right?

3 A. For table 10, yes.

4 MR. TENENBAUM: All of these types of
5 questions, we will be glad to answer outside
6 the deposition.

7 I don't know why we need to take all
8 of these attorneys' time with questions like
9 this.

10 We are ready to cooperate with you on
11 questions like that.

12 MR. KARAGANIS: Mr. Tenenbaum, you have
13 hardly been cooperative.

14 MR. TENENBAUM: We have tried at every
15 endeavor that we can.

16 MR. KARAGANIS: Your self-serving
17 statements don't do you any service.

18 MR. TENENBAUM: I don't recall ever being
19 asked that question outside a deposition.

20 BY MR. KARAGANIS:

21 Q. Mr. Boice, directing your attention to
22 Boice Deposition Exhibit No. 3, directing your
23 attention specifically to the document that you
24 have marked as the administrative record for

1 Midco I, 106 order. Can you find the 106
2 order?

3 A. The 106 order?

4 Q. For Midco I, yes.

5 MR. TENENBAUM: Why do we have to have him
6 look through all these boxes for the 106 order?
7 You have all been served with the copies of the
8 106 order.

9 MR. KARAGANIS: I am not sure that mine's
10 accurate.

11 I want to make sure that the one that
12 you have is the accurate one. After all, it is
13 the official record, as you indicated.

14 Q. Directing your attention to the
15 document which you have shown me in a green
16 folder entitled, "Update number 3, documents
17 for unilateral administrative order Midco I
18 Gary, Indiana, February 1990, Part 3 of 3."

19 Were you responsible, Mr. Boice, for
20 contracting with the firm of PRC Environmental
21 Management to conduct an evaluation of
22 endangerment as reflected in appendix 3 of the
23 106 order for Midco I?

24 MR. TENENBAUM: Objection. Goes to

1 record-review issue of imminent and substantial
2 endangerment.

3 MR. KARAGANIS: You made your objection,
4 Are you instructing the witness not to
5 answer?

6 MR. TENENBAUM: I will unless you can
7 proffer some reason that it goes to a
8 non-record issue.

9 MR. KARAGANIS: Among other things, it goes
10 to the fact that there may have been ex parte
11 communications that may not be reflected in the
12 record.

13 It goes to the fact that there may
14 have been a deliberate attempt to find an
15 imminent and substantial endangerment -- and to
16 the possibility that it doesn't exist -- simply
17 as a mechanism for engaging in illegal coercion
18 of the potentially responsible parties to enter
19 into a remedy that was inappropriate and
20 illegal.

21 MR. TENENBAUM: It sounds like what you
22 said all goes to the issue of the record on
23 imminent and substantial endangerment.

24 MR. KARAGANIS: It goes to sufficient cause

1 for the defendants to refuse to comply with an
2 illegal administrative order.

3 It goes to whether or not the
4 defendants' constitutional rights have been
5 deliberately violated by the government by
6 engaging in ex parte communications, by taking
7 testimony or factual information from witnesses
8 without giving the potentially responsible
9 parties an opportunity to confront and to cross
10 examine said witnesses.

11 There are a number of constitutional
12 and statutory violations at issue here that go
13 well beyond the scope of any administrative
14 record, sir.

15 MR. TENENBAUM: I haven't heard anything
16 that takes this outside of a record issue.

17 MR. KARAGANIS: Are you instructing the
18 witness not to answer?

19 MR. TENENBAUM: Unless I hear something
20 else, I am going to instruct the witness not to
21 answer.

22 MR. KEATING: Our objection is we believe
23 there might be something outside the record
24 that may either be relevant as to whether there

1 is an imminent and substantial danger. That is
2 why we would pose the question.

3 MR. TENENBAUM: I would suggest either two
4 alternatives.

5 I would suggest that we believe there
6 is something that belongs in the record --

7 MR. KEATING: Outside the record.

8 MR. TENENBAUM: Something that is outside
9 the record that belongs inside the record.

10 I would suggest that you call that to
11 our attention and we will evaluate your letter.

12 Alternatively, if you don't want to do
13 that, you are always free to make a motion to
14 the court indicating that you think that the
15 record is incomplete and indicate the document
16 that you believe belongs in there.

17 MR. FORT: Mr. Tenenbaum, how are we to get
18 that when it is a conversation between a
19 contractor and Mr. Boice?

20 I don't understand how we are going to
21 find the document, since in all of your
22 discovery answers you have made reference in
23 your answers to ours, Desoto's -- you have
24 referred us to the record, or to Mr. Boice as

1 having knowledge.

2 MR. TENENBAUM: I am not sure what
3 conversation you are referring to.

4 MR. KARAGANIS: Let's explore this. You
5 have instructed the witness not to answer.

6 Q. Mr. Boice, the letter from PRC which
7 is listed as appendix 3 references the fact
8 that the letter was prepared as part of work
9 assignment number C 05006.

10 Is that work assignment part of the,
11 quote-unquote, administrative record for the
12 106 order?

13 A. That contract?

14 Q. The work assignment.

15 A. The work assignment. No.

16 Q. Does the work assignment mention Midco
17 I?

18 A. What do you mean?

19 Q. Does the work assignment have the
20 words Midco I in it?

21 MR. TENENBAUM: Same objection.

22 MR. KARAGANIS: We are dealing with
23 something that you don't even have as part of
24 your administrative record, Mr. Tenenbaum.

1 How are you going to make the same
2 objection?

3 MR. TENENBAUM: You are asking questions
4 about the compilation of the administrative
5 record.

6 MR. KARAGANIS: We are asking questions
7 about a document which by definition isn't even
8 in the administrative record.

9 MR. TENENBAUM: Right.

10 Your contention is it belongs in the
11 administrative record?

12 MR. KARAGANIS: That's right. I am
13 entitled to inquire about it.

14 MR. TENENBAUM: Not unless you make a
15 proper showing. Get it in front of the court.

16 MR. HILL: The court granted a motion that
17 we are not allowed to ask questions in the
18 absence of that showing?

19 MR. KARAGANIS: No.

20 MR. HILL: I will withdraw my comment.

21 (Discussion had off the record.)

22 MR. KARAGANIS: We are going back on the
23 record.

24 Q. Mr. Boice, I have asked you a

1 question.

2 Does work assignment number C 05006
3 contain the words Midco?

4 MR. TENENBAUM: The same objection.

5 If you know the answer, you can answer
6 it.

7 A. Yes, it would.

8 BY MR. KARAGANIS:

9 Q. In the course of your work with PRC --
10 I am sorry.

11 You did testify earlier, did you not,
12 that work assignment C 05006 is not in this
13 administrative record, isn't that right?

14 A. Yes.

15 Q. In the course of your work in
16 assigning a task with respect to an assessment
17 of endangerment for PRC, did you have occasion
18 to have telephone calls?

19 MR. TENENBAUM: Objection.

20 MR. KARAGANIS: I am not asking about the
21 content of the telephone calls. I am asking
22 about whether he had telephone calls.

23 MR. TENENBAUM: You are not entitled to
24 take discovery into the agency's process in

1 finding imminent and substantial endangerment.

2 MR. HILL: That is just contract procedure,
3 hiring of PRC.

4 MR. TENENBAUM: It sounds to me like this
5 is part and parcel of the imminent and
6 substantial endangerment issue, isn't it?

7 MR. KARAGANIS: I will just tell you that
8 if he had telephone calls, my next question is,
9 is he in the practice of maintaining
10 handwritten records of telephone conversations,
11 which I believe Mr. Boice is in the habit of
12 doing.

13 So, whether or not he included his
14 handwritten conversations or the records
15 thereof in this record, I am attempting to find
16 out what is and isn't in the record, Mr.
17 Tenenbaum.

18 I am entitled to do that under any
19 vision that you may have of the limitations on
20 discovery.

21 MR. TENENBAUM: Mr. Boice has certified the
22 contents of the record.

23 MR. KARAGANIS: We don't believe he is
24 telling the truth. How is that for a flat

1 statement?

2 MR. TENENBAUM: Well, you have to then make
3 a showing as to why you don't believe he is
4 telling the truth.

5 MR. KARAGANIS: I am about to make that.

6 MR. TENENBAUM: I don't think that showing
7 is appropriately made in deposition. It is
8 appropriately made by motion to the court.

9 BY MR. KARAGANIS:

10 O. Mr. Boice, did you have telephone
11 conversations with PRC relative to retaining
12 them to do an endangerment assessment in the
13 year 1989?

14 MR. TENENBAUM: Objection, seeks
15 record-review issues. Instruct the witness not
16 to answer.

17 MR. KEATING: Our comment on that, sir, is
18 that this is a preliminary question. You are
19 objecting to the preliminary questions.

20 I believe the court is going to rule
21 that we are allowed to ask the preliminary
22 questions, to find out whether he is going to
23 answer yes or no. And then you go into whether
24 you have an objection or not.

1 Now, if we come back here, they are
2 hundreds of dollars of legal talent here that
3 someone might have to pay for. And we are
4 going to ask that it be you.

5 So, if you object to a question, why
6 don't you make sure that it is a question that
7 is not a preliminary question.

8 MR. SHELDON: I would also point out in
9 order to try to move this along, Mr. Tenenbaum,
10 you seem to be focusing on what is or is not in
11 your mind an administrative review issue.
12 There are issues that the government has made
13 issues in this case that have nothing to do
14 with and are not certainly limited to the
15 administrative record.

16 While it may be relevant, it is also
17 relevant to know what the government knew or
18 thought at the same time that the defendants
19 were being asked to do something, and whether
20 or not material in the hands of the government
21 was shared with the defendants.

22 And other questions that are relevant
23 to issues of sufficient cause, issues of good
24 faith negotiations, issues of adequacy of

1 remedy or understanding of the facts, all of
2 which are relevant in this case, under the
3 complaint that the government has filed against
4 the defendants.

5 And I urge you to stop this process of
6 instructing the witness not to answer the
7 questions on the very limited view of what the
8 scope of proper discovery is.

9 I think your view is mistaken. I would
10 join with others in trying to seek costs if we
11 can't get through this deposition in a proper
12 way.

13 MR. TENENBAUM: If anyone is able to
14 proffer any basis from which any of these
15 questions are pertaining to a non-record review
16 issue, I am certainly willing to listen to
17 that, but I haven't heard thus far.

18 MR. FORT: We have suggested a couple
19 already. One is penalties, one is sufficient
20 cause.

21 And I have read your pleading
22 carefully, sir, to say those are not limited to
23 the administrative record. You went out of
24 your way to make that distinction on liability,

1 sir.

2 MR. TENENBAUM: No. I do not agree with
3 your statement on sufficient cause, that the
4 sufficient cause part of the statute does not
5 somehow override.

6 MR. FORT: What about penalties, then, what
7 about penalties?

8 MR. TENENBAUM: I don't understand your
9 point, what about penalties?

10 MR. FORT: Is relevance of discovering this
11 information for the purpose of penalties that
12 you have threatened not relevant to seeking
13 what was going on behind the record here?

14 MR. TENENBAUM: I haven't seen any argument
15 that suggests that it is relevant to that.

16 MR. KARAGANIS: Let's move on.

17 We are not going to make any progress
18 with Mr. Tenenbaum. Mr. Tenenbaum is set on a
19 certain path and --

20 MR. TENENBAUM: We have advised you of our
21 position on this.

22 We have a motion pending in the court.
23 We have had a motion on the related issue of
24 the first consent degree pending for a while.

1 We are waiting for the court to rule.

2 MR. KARAGANIS: Mr. Tenenbaum, you had no
3 business in instructing the witness not to
4 answer, absent a protective order.

5 I think that your actions are wholly
6 inappropriate.

7 Let me move on.

8 MR. TENENBAUM: You haven't cited to me any
9 case involving administrative record review
10 that indicates that I am supposed to allow the
11 witness to answer a question under these
12 circumstances.

13 BY MR. KARAGANIS:

14 O. Mr. Boice, directing your attention to
15 the administrative record, the entire
16 administrative record for the 106 order for
17 Midco I, including the 106 order itself.

18 Can you point to me, sir, anywhere
19 where the 106 order or the administrative
20 record for the 106 order for Midco I identifies
21 what relief may be necessary to abate any
22 imminent or substantial endangerment to the
23 public health or welfare which does or may
24 exist?

1 MR. TENENBAUM: Objection, calls for a
2 legal conclusion.

3 MR. KARAGANIS: I am asking, sir, for the
4 specific remedy that is necessary to abate any
5 threat or reality of a substantial and imminent
6 endangerment to the public health or
7 environment.

8 You have said that my client has
9 refused to obey a 106 order. We are prepared
10 to address immediately any remedy that is
11 necessary to abate any threatened or real
12 imminent or substantial endangerment to the
13 environment.

14 I cannot find any reference to the
15 remedy that is necessary to do that in the 106
16 administrative order. If you can point me to
17 it, or have the witness point me to it.

18 This goes to the heart of sufficient
19 cause.

20 MR. TENENBAUM: We are familiar with your
21 position on that, and we don't agree with the
22 it.

23 And we are certainly not going to
24 allow the witness to testify on the

1 administrative decision-making process which
2 underlies the administrative order.

3 BY MR. KARAGANIS:

4 O. Mr. Poice, please state what remedy is
5 necessary to abate a real or potential imminent
6 and substantial endangerment at Midco I?

7 MR. TENENBAUM: Objection, direct the
8 witness not to answer, calls for a
9 record-review deliberative process.

10 MR. KARAGANIS: I will state to you for the
11 last time, Mr. Tenenbaum, that you cannot find
12 anywhere in the record where that question is
13 answered, period.

14 I have reviewed the record line by
15 line with respect to whether or not the
16 administrative order identifies the remedy
17 necessary to abate any imminent and substantial
18 endangerment, and the order is devoid of
19 identifying the remedy necessary for such a
20 abatement.

21 MR. TENENBAUM: I am not going to debate
22 with you the legal niceties of the orders and
23 so on and the comments thereto. I am not going
24 to debate that.

1 MR. KARAGANIS: Let the record show that
2 the government attorney has instructed the
3 remedial program manager for the Midco I site
4 to refuse to answer what remedy is necessary to
5 abate any real or potential imminent
6 endangerment or substantial endangerment to the
7 environment.

8 I will state for the record as an
9 officer of the court that I have been through
10 the administrative order line by line, and the
11 documents allegedly in support thereof, and I
12 can find no identification of the remedy
13 necessary to abate any imminent and substantial
14 endangerment.

15 And, therefore, I am unable to advise
16 my client as to whether or not to comply with
17 such demand, since no demand can be found in
18 the administrative order.

19 MR. TENENBAUM: Let the record reflect that
20 we disagree with that explanation of the state
21 of the case and legal issues therein.

22 MR. KARAGANIS: You keep wanting all -- I
23 will send you a letter that says please tell me
24 what remedy is available to abate any imminent

1 and substantial endangerment that exists at the
2 Midco I site or the Midco II sites.

3 You have instructed the witness not to
4 answer. I want the record to be clear that
5 counsel for American Can Company and American
6 National Can has tried to identify what relief
7 is necessary to abate this endangerment, that
8 presumably exists or is threatened to exist and
9 we can't find out.

10 O. Move on.

11 Mr. Boice, would you be kind enough
12 now to turn to Boice Deposition Exhibit No. 3
13 and go through item number 2, the
14 administrative record for response action for
15 the Midco II site in Gary, Indiana, record of
16 decision June 30, 1989.

17 Please mark "Midco II R.O.D." with
18 your initials on the appropriate pages.

19 MR. FORT: Mr. Tenenbaum, while we are
20 waiting for him to go through that, then, may I
21 look at the two boxes that are stacked over
22 there indicated as being Licht documents?

23 BY MR. KARAGANIS:

24 O. Mr. Boice, would you state for the

1 record, the government has brought along two
2 boxes --

3 MR. TENENBAUM: Just a second. I will look
4 at these documents. I don't know if these
5 documents are brought along for Mr. Boice to
6 discuss or not.

7 MR. KARAGANIS: Let's find out what they
8 are.

9 MR. TENENBAUM: I will find out what they
10 are. I don't know if we are producing them or
11 what.

12 BY MR. KARAGANIS:

13 Q. Mr. Boice, what are the documents in
14 those two boxes without describing their
15 contents? What do they purport to be?

16 A. I haven't inspected them.

17 Q. Do you know what the content of them
18 is?

19 MR. TENENBAUM: Let's go off the record
20 first.

21 Let's go off the record for a second.

22 (Discussion had off the record.)

23 BY MR. KARAGANIS:

24 Q. Go ahead, Mr. Boice.

1 MR. TENENBAUM: For the record, I reiterate
2 the same objection, the last procedure for
3 Midco I --

4 A. Midco II.

5 MR. TENENBAUM: -- Reiterate my earlier
6 objection to this process.

7 BY MR. KARAGANIS:

8 Q. Now, Mr. Boice, with respect to the
9 documents you have identified as the
10 administrative record for the Midco II R.O.D.,
11 which is the Midco II response action item
12 number 2 on Boice Deposition Exhibit 3,
13 response action for the Midco II site in Gary,
14 Indiana record of decision June 30, 1989.

15 You have indicated that liability
16 documents are maintained, is that correct?

17 A. Yes.

18 Q. That's part of the administrative
19 record?

20 A. Yes.

21 MR. TENENBAUM: Which administrative
22 record?

23 BY MR. KARAGANIS:

24 Q. The administrative record for the

1 Midco II R.O.D., namely the June 30, 1989
2 record of decision, item 2 on Boice Deposition
3 Exhibit 3.

4 Is that correct?

5 A. I think I made a mistake. I think
6 that is only for the unilateral.

7 Q. Don't cross anything out yet.

8 You want to change your testimony at
9 this point; is that correct?

10 A. Yes.

11 Q. All right.

12 You want to change your testimony to
13 the effect that the liability documents are
14 not -- the documents that are listed as Midco I
15 liability documents in Boice Deposition Exhibit
16 No. 3, the liability documents that are listed
17 as Midco II liability documents are not part of
18 the administrative record for it?

19 A. For the R.O.D.?

20 Q. For the so-called record of decision
21 documents of June 30, 1989, items 1 and 2 on
22 Boice Deposition Exhibit No. 3; is that
23 correct?

24 A. That's correct.

1 O. All right.

2 A. Do you want me to cross them out?

3 O. No.

4 I think what we will do when you go
5 back -- yes, would you please cross out on the
6 Midco II liability documents the administrative
7 record identification which was incorrectly
8 added, and please initial it as you cross it
9 out.

10 MR. TENENBAUM: Do you have the same
11 problem on Midco I?

12 MR. KARAGANIS: We are going to go back and
13 correct it.

14 A. Yes.

15 Q. Now, Mr. Boice, would you please -- I
16 am sorry.

17 I take it you wish to correct your
18 testimony, your prior testimony, with regard to
19 the liability documents as to whether or not
20 they were a part of the administrative record
21 for the Midco I record of decision of June 30,
22 1989?

23 A. Yes.

24 O. Okay.

1 Would you please again make the
2 corrections by crossing out the inappropriate
3 record reference and initialing your cross out.

4 Mr. Boice, as remedial program
5 manager, do you keep files of your own with
6 respect to various sites that you are working
7 on, such as Midco I or Midco II?

8 A. Yes.

9 O. Have you included all of those files
10 in the administrative record for the response
11 action for the Midco I site in Gary, Indiana --
12 strike that.

13 Have you included all of your files in
14 one or more of the four records that you have
15 identified in Boice Deposition Exhibit No. 3 on
16 the first page?

17 MR. TENENBAUM: Objection, instruct the
18 witness not to answer. Record review.

19 MR. KARAGANIS: Mr. Tenenbaum, I am
20 entitled to lay a foundation as to whether or
21 not this witness has completely included all of
22 the documents that related to either the Midco
23 I or Midco II site.

24 MR. TENENBAUM: I don't know that the

1 standard is one of relation, is it?

2 MR. KARAGANIS: Whether they are relevant
3 to it, yes. If they are relevant to any issues
4 in your alleged determination.

5 MR. TENENBAUM: Oh, that is a slightly
6 different standard. But Mr. Boice has
7 certified the --.

8 MR. KARAGANIS: I didn't ask that question.

9 I am asking him whether or not he
10 included all of his files.

11 MR. TENENBAUM: Well, you are not entitled
12 to take discovery on documents that were not
13 put into the administrative record, absent a
14 showing indicating that there is some reason to
15 believe that there is something that wasn't put
16 in.

17 MR. KARAGANIS: Is it your statement, Mr.
18 Tenenbaum, that as to documents that are
19 relevant to the EPA's decision that were
20 inadvertently or otherwise not included in the
21 administrative record, that we are not entitled
22 to engage in discovery to identify such
23 documents?

24 MR. TENENBAUM: You changed your standard.

1 First of all, you stated that related
2 in any way to Midco I or Midco II. You have
3 now changed that to related to the selection.

4 MR. KARAGANIS: No. Related to any of the
5 EPA's administrative decision.

6 Are you instructing the witness not to
7 answer with respect to identification of
8 documents that may be relevant that by
9 inadvertence or by deliberation were not
10 included in the so-called administrative
11 records for these four actions?

12 MR. TENENBAUM: The witness has certified
13 these records as complete.

14 If you have any reason to believe that
15 they are not complete, you tell us and --

16 MR. KARAGANIS: We already have evidence
17 that they are not complete.

18 MR. TENENBAUM: I haven't heard it.

19 MR. KARAGANIS: You have got among other
20 things redactions.

21 You have got among other things
22 contracts with respect to Midco -- one of the
23 Midco sites, we don't know which one because
24 you wouldn't let him testify -- that are not

1 included in this administrative record, with
2 respect to endangerment --

3 MR. TENENBAUM: I will be glad to send you
4 a letter on the status of the contracts.

5 MR. KARAGANIS: Mr. Tenenbaum, I continue
6 to suspect --

7 MR. TENENBAUM: The situation with respect
8 to the contracts.

9 I will also send you letter on the
10 situation with respect to the redacted
11 materials explaining that situation.

12 MR. KARAGANIS: Mr. Tenenbaum.

13 MR. TENENBAUM: These are legal questions
14 and they will be argued before the court on
15 legal motions. You don't need to take the
16 witness' and the attorneys' time here with
17 legal questions.

18 MR. KEATING: My objection is that we
19 believe that there are documents that haven't
20 been included or should have been included in
21 the index that were not done so, and we believe
22 that the deposition should be amended with
23 that.

24 MR. TENENBAUM: I haven't heard any showing

1 that there is a failure to include anything
2 that hasn't been included.

3 MR. KARAGANIS: All of update 4, Mr.
4 Tenenbaum, is evidence that you didn't include
5 it in the administrative record.

6 These documents weren't included in
7 the administrative record until after you had
8 made a formal officer of the court
9 representation to the court that the full
10 administrative record had been compiled and
11 indexed.

12 So that your statement to the court is
13 inaccurate and not true.

14 And this is evidence that there are
15 documents outside what you had identified as
16 the administrative record that are coming to
17 the fore and we are entitled to investigate
18 whether there are more such documents.

19 MR. TENENBAUM: The documents are a part of
20 the record.

21 I will also be glad to send you a
22 letter which regard to the documents.

23 MR. KARAGANIS: I suggest you write a
24 letter to the court withdrawing your

1 representation that all of the documents were
2 in the administrative record, Mr. Tenenbaum,
3 which is an inaccurate statement, that you
4 write a formal letter to the court so stating.

5 MR. TENENBAUM: I will be glad to send you
6 a letter in view of whatever statements you are
7 referring to.

8 MR. KEATING: I would rather have it under
9 oath by this witness..

10 MR. KARAGANIS: That's what I would prefer
11 to do.

12 MR. TENENBAUM: These are legal matters.

13 MR. KARAGANIS: Mr. Tenenbaum --

14 MR. KEATING: Wait a minute, Joe.

15 These are factual matters. That's the
16 point. They are factual matters we are asking
17 about.

18 You are objecting prematurely before
19 we can ask, before he answers whether he has
20 information or whether the document exists.
21 And then you are saying we don't have the
22 information.

23 Now, you are not going to win on a
24 circular argument like that. I mean, we are

1 entitled to find out whether the documents
2 belong, whether they were included, whether it
3 is redacted or whatever the hell the word is,
4 and then you can make an objection as to
5 whether it goes into part of the record. But,
6 you are not doing that.

7 MR. TENENBAUM: You have that information.

8 You know that update 4 is part of the
9 record. You know that the -- the testimony was
10 permitted subject to our objection that the
11 contracts were not in the record.

12 And you know the situation that the
13 redacted material is something that was taken
14 out, most likely for reasons relating to a
15 privilege of some sort.

16 I will be glad to expound upon those
17 in a letter to you.

18 MR. KEATING: We are asking for the
19 expounding now from the witness.

20 MR. FORT: Let's get some questions going.

21 BY MR. KARAGANIS:

22 Q. Mr. Boice, directing your attention to
23 a document which you have marked on Boice
24 Deposition Exhibit No. 3, a category as being

1 part of the record of decision, administrative
2 record for the Midco II site, dated June 30,
3 1989.

4 Directing your attention to the green
5 folder entitled, "USEPA administrative order
6 update number 4, Midco II, Gary, Indiana, with
7 documents for unilateral administrative order
8 dated May 1990."

9 Mr. Tenenbaum, is it not correct that
10 prior to May of 1990, the documents in this
11 green folder --

12 MR. FORT: Mr. Boice.

13 BY MR. KARAGANIS:

14 Q. I am sorry.

15 Mr. Boice, is it not correct that
16 prior to May of 1990, the documents in this
17 green folder were not included in the items
18 designated as a portion of the administrative
19 record for the Midco II R.O.D.?

20 MR. TENENBAUM: Objection, vague.

21 A. Would you clarify that?

22
23 BY MR. KARAGANIS:

24 O. Is it not correct that they are not

1 designated as part of the record for the Midco
2 II R.O.D. prior to May of 1990?

3 A. Would you clarify that?

4 O. What is it you don't understand, Mr.
5 Boice?

6 A. What do you mean by designated?

7 O. Included in an item in a list that
8 said these are part of the administrative
9 record for the Midco II R.O.D. of June 30,
10 1989.

11 A. That's correct.

12 O. And directing your attention to the
13 same green folder entitled, "Update number 4,
14 Midco II with documents for unilateral
15 administrative order."

16 Is it not correct that these documents
17 were not included as part of the administrative
18 record for the Midco II section 106 order until
19 May of 1990?

20 MR. TENENBAUM: Objection, vague.

21 A. I will ask you to clarify that.

22 MR. TENENBAUM: We can assume it is the
23 same clarification.

24 You can answer, if he will let you do

1 that.

2 A. Okay.

3 What do you mean was it included?
4 Were they designated and put in a separate file
5 like this, no.

6 BY MR. KARAGANIS:

13 7 Q. Was it included in any index, prior
8 index, released to anybody, the public or any
9 of the parties, as being part of the Midco II
10 June 30, 1989 R.O.D. administrative record or
11 the Midco II December 1989 administrative
12 order?

13 A. Some of this, a lot of the information
14 was already available to the Midco trustees,
15 but the compilation was not put together right.

16 Q. As a matter of fact, the documents
17 were not identified as part of the
18 administrative record; isn't that right?

19 MR. TENENBAUM: Objection.

20 BY MR. KARAGANIS:

21 Q. Go ahead.

22 A. Would you clarify that?

23 Q. The documents that are in update
24 number 4, which are identified in Boice

1 Deposition Exhibit No. 3 as being part of the
2 Midco II R.O.D. for June 30, 1990, were not
3 identified as being part of the administrative
4 record until May of 1990; isn't that right?

5 MR. TENENBAUM: Object.

6 Maybe I can speed things along.

7 MR. KARAGANIS: Let him answer, please.

8 MR. KEATING: That is a good question.

9 BY MR. KARAGANIS:

10 Q. Please answer my question, Mr. Boice.

11 A. No. They weren't put together and
12 identified as part of the administrative
13 record.

14 Q. Thank you.

15 A. Until May 1990.

16 Q. Thank you.

17 Directing your attention to the
18 pagination with respect to this record for
19 update, the index on the update number 4 for
20 Midco II was not compiled until 5/20/90, isn't
21 that right? May 20, 1990.

22 A. That's correct.

23 Q. And is it not correct to your
24 knowledge that the first time any of the

1 defendants received a copy of the update number
2 4 for Midco II or the update number 4 for Midco
3 I was today?

4 MR. TENENBAUM: Continuing objection.

5 BY MR. KARAGANIS:

6 Q. Go ahead.

7 A. I don't know when you received it.

8 Q. All right.

9 But certainly it had to be after May
10 20 of 1990; isn't that right?

11 A. That's correct.

12 Q. What day of the week was May 20, do
13 you know?

14 A. No.

15 Q. Mr. Boice, directing your attention to
16 the document number 000001 in the Midco II
17 update, that also indicates that that document
18 has been also redacted; isn't that right?

19 A. That's correct.

20 The same document as in Midco I. I
21 don't think we need to talk about it anymore.

22 Q. You may not need to, I do.

23 MR. TENENBAUM: We will stipulate that it
24 is the same document and the answers are the

1 same and the objections and the rest.

2 BY MR. KARAGANIS:

3 Q. Mr. Boice, isn't it correct that the
4 term redacted means either cutting out text,
5 physically or by whiting it out so it doesn't
6 show up on a xerox?

7 MR. TENENBAUM: Objection.

8 BY MR. KARAGANIS:

9 Q. Do you know? Please answer the
10 question.

11 A. I don't know the dictionary definition
12 of redacted.

13 Q. What do you do when you redact
14 something?

15 MR. TENENBAUM: Objection, there has
16 nothing to do with anything other than a
17 records issue.

18 BY MR. KARAGANIS:

19 Q. What do you do when you redact
20 something, Mr. Boice?

21 MR. TENENBAUM: We haven't even established
22 he has redacted them.

23 BY MR. KARAGANIS:

24 Q. Go ahead.

1 A. You eliminate a portion that you have
2 determined that based on the criteria and
3 regulations of the agency should not be
4 released to other parties or to the public.

5 Q. Mr. Boice, other than the two
6 documents we have mentioned, are there any
7 other redactions in any of the four
8 administrative records we have identified
9 today?

10 MR. TENENBAUM: Same objection.

11 You can answer, if you know.

12 A. I'm not sure.

13 BY MR. KARAGANIS:

14 Q. Have you gone back and made a record
15 of which ones have been redacted?

16 A. No.

17 Q. All right.

18 So in order to find out what has been
19 redacted, we have to rely on your word that it
20 has been redacted?

21 A. It is in the record.

22 Q. We have to go through each page to see
23 whether or not EPA has noted whether there has
24 been a redaction; is that right?

1 A. I think that's correct, yes, although
2 it might be noted here.

3 Q. When you say here, you are referring
4 to Boice Deposition Exhibit No. 3?

5 A. In the administrative order, in the
6 administrative record index.

7 Q. Now, when we say the administrative
8 record index, we have already agreed that it is
9 really an index of four different
10 administrative records; isn't that right?

11 A. That's correct.

12 Q. Now, is there any indication in Boice
13 Deposition Exhibit No. 3 what documents have
14 been subject to redaction?

15 A. I haven't looked through the whole
16 thing.

17 Q. Please do.

18 MR. TENENBAUM: The document speaks for
19 itself.

20 BY MR. KARAGANIS:

21 Q. For the record, if there is a code or
22 a notation that says this stands for redaction,
23 please let us know.

24 A. Under liability documents, it is noted

1 that these are only available in Region V, in
2 the record available at the Gary City Hall.

3 One document identified as privileged
4 document withheld from the public portion of
5 the administrative record.

6 BY MR. KARAGANIS:

7 O. All right.

14 None of the documents we discussed
9 earlier today is identified as a privileged
10 document, isn't that correct?

11 A. I would have to look. You mean this
12 record here?

13 O. In update number 4 for either Midco I
14 or Midco II.

15 Is it not correct that none of the
16 redacted memos are identified in the
17 administrative record as privileged, isn't that
18 correct?

19 A. You mean in the administrative record
20 index?

21 O. In the administrative record index.

22 A. Okay.

23 For Midco I it doesn't identify them
24 as redacted.

1 Q. It doesn't identify them as
2 privileged, isn't that correct, Mr. Boice?

3 A. That's right, it doesn't identify them
4 as redacted or privileged.

5 MP. TENENBAUM: Whatever the record may
6 say, the privilege -- we do claim privilege
7 with respect to any redactions, and we will be
8 glad to state a fuller basis for any claim of
9 privilege.

10 A. In Midco II it also doesn't say that
11 it was redacted, portions were redacted.

12 BY MR. KARAGANIS:

13 Q. Or privileged, isn't that correct?

14 A. That's correct.

15 Q. Mr. Boice, would you be kind enough
16 now, one last administrative record to
17 identify, that is the 106 administrative record
18 for Midco II, which is item number 4 on Boice
19 Deposition Exhibit No. 3.

20 MR. KEATING: Is that the marking, did you
21 have it marked number 4?

22 MR. KARAGANIS: It is also identified on
23 the first page, Jim, as item number 4.

24 A. I could save time by stating that the

1 entire index is part of the unilateral.

2 Q. Please, Mr. Boice, mark on the
3 documents that are relevant and part of the
4 administrative record for the 106
5 administrative order.

6 MR. TENENBAUM: Again I reiterate my
7 objections and agree with the witness. It is a
8 waste of time.

9 MR. KARAGANIS: Mr. Boice, while you are
10 doing that, why don't we let people take a five
11 minute break.

12 (Whereupon a short recess was had.)

13 Q. Mr. Boice, directing your attention to
14 the administrative record index that you have
15 identified as the Midco II 106, would you tell
16 me where that is, please?

17 Yes. Would you show me where the
18 Midco II 106 index begins?

19 MR. TENENBAUM: You want to know the first
20 page?

21 MR. KARAGANIS: Yes.

22 A. For the unilateral order?

23 Q. For the Midco II unilateral
24 administrative order or 106 order.

1 Now, Mr. Poice, where are the
2 documents that correspond to the index that
3 says Midco II, 106 Midco II liability
4 documents,

5 A. Those are in Region V files.

6 Q. You don't have them here?

7 A. Some of them are here.

8 Q. When you say some of them. Did you
9 bring the administrative record with you for
10 the Midco II 106 order?

11 A. Not the entire one.

12 I said the entire record including the
13 liability documents or some of the liability
14 documents for -- or most of the liability
15 documents are not here.

16 Q. All right.

17 They are back at Region V?

18 A. Right.

19 MR. KARAGANIS: I would ask counsel to
20 bring them for tomorrow's session, the
21 liability documents.

22 MR. TENENBAUM: We will do our best.

23 MR. KARAGANIS: That's part of the request,
24 the document request.

1 Q. Mr. Boice, directing your attention to
2 the liability documents that are listed in the
3 index, would you tell me for Midco II, were the
4 liability documents for American Can Company --
5 were they even listed in the administrative
6 index?

7 A. For Midco log and Midco shipping
8 documents, including the Midco pickup tickets,
9 generator tally and freight tickets, invoices,
10 collection receipts, purchase orders, shipping
11 orders.

12 Q. All right.

13 Do you have those with you here today?

14 A. I understand that those are here.

15 Q. All right.

16 Would you show me which documents
17 relate to American Can Company, please, since
18 they are not identified in the index as
19 relating to American Can Company?

20 I am talking about specifically for
21 Midco II.

22 A. For Midco II?

23 Q. Yes.

24 MR. TENENBAUM: For the record, I don't

1 believe all the liability documents have been
2 brought here today. We will try to bring as
3 many as we can tomorrow.

4 I will allow the witness to answer
5 based on documents that are here, and if you
6 want to follow up tomorrow morning with respect
7 to the documents that are not here, fine.

8 A. I don't see the Midco log.

9 BY MR. KARAGANIS:

10 Q. I am sorry. I don't think either I or
11 the court reporter heard your answer. Mr.
12 Boice?

13 A. I said I don't see the Midco log here.

14 Q. You have given me two folders, one a
15 brown manila folder which has got the legend
16 American Can on it, then a tan manila folder
17 with the legend American Can on it.

18 Is that correct?

19 A. That's correct.

20 Q. Now, which of the two folders relate
21 to the Midco II?

22 A. Okay.

23 MR. TENENBAUM: Do you want to take time to
24 review the contents?

1 A. I think I pretty much know.

2 We know that Midco II is the focus of
3 the operation of the Midco -- between the Midco
4 I fire in December 1976 until the Midco
5 operation discontinued, or at least until the
6 Midco II fire in August 1977.

7 So all shipments that occurred
8 between -- that occurred between December 1976
9 and August 1977 most likely went to Midco II.

10 BY MR. KARAGANIS:

11 O. I didn't ask you most likely.

12 Do you know they went to Midco II?

13 MR. TENENBAUM: Of his personal knowledge?

14 MR. KARAGANIS: He is EPA's 30 (b) 6
15 witness.

16 MR. TENENBAUM: That's the point, to
17 clarify whether we are doing this at this time
18 in the capacity of personal knowledge or 30 (b)
19 6 witness.

20 MR. KARAGANIS: He was identified as a 30
21 (b) 6 witness this morning.

22 MR. TENENBAUM: You have mixed up this
23 deposition. I don't know what notice we are
24 under.

1 MR. KARAGANIS: The category that I am
2 asking questions about is a 30 (b) 6 notice.

3 Q. Do you have actual evidence that the
4 American Can Company shipments went to Midco II
5 in the documents you are showing me now in the
6 dark brown manila envelope?

7 A. We also have --

8 MR. TENENBAUM: Let me state my objection
9 that I made earlier to that request.

10 The evidence with respect to American
11 Can and other defendants is not -- is largely
12 obtained from third-parties and from documents
13 from American Can themselves, and deposition
14 transcripts and so on.

15 And to the extent you are seeking a
16 general description of that evidence, I will
17 allow the witness to answer.

18 MR. KARAGANIS: I am asking with respect to
19 the administrative record, Mr. Tenenbaum.

20 You showed me an administrative record
21 which purports show the liability of American
22 Can for shipments to Midco II. I am asking
23 this witness where are the documents in the
24 administrative record that show that these

1 shipments went to Midco II.

2 MR. TENENBAUM: That is not what your 30

3 (b) 6 designation was.

4 MR. KARAGANIS: It certainly was.

5 MR. TENENBAUM: I don't believe so.

6 MR. KARAGANIS: Excuse me.

7 All facts or information relating to
8 whether American Can arranged for treatment or
9 disposal of hazardous substances at either or
10 both of the Midco sites which are the subject
11 of the above-captioned litigation.

12 MR. TENENBAUM: Right. That I will allow
13 him to answer, subject to my previously stated
14 objection.

15 But if you want to know something
16 about the contents of the administrative
17 record, I am not going to allow him to answer
18 that.

19 BY MR. KARAGANIS:

20 Q. Where is the evidence in these
21 materials that shows that American Can Company
22 sent waste to Midco II?

23 MR. TENENBAUM: You may answer.

24 My direction to the witness is that

1 you may answer the question with respect to the
2 30 (b) 6 designation that you were designated
3 to testify under. If you would like to see
4 that, you may.

5 But that's the only at this time with
6 respect to this question. That's the only
7 question here -- you can answer that question
8 and that's the only question they will be
9 permitted to ask on that.

10 Subject to that instruction, you may
11 answer the 30 (b) 6 designation with respect to
12 evidence relating to American Can and the Midco
13 II site.

14 A. Okay.

15 The basis for our determination that
16 they were a responsible party. What exactly is
17 the question?

18 MR. TENENBAUM: You want to see the
19 designation? Designation number 1.

20 MR. KARAGANIS: I will just state for the
21 record, Mr. Tenenbaum, that I am sure you have
22 not been so remiss as to put attorney's work
23 product in the administrative record
24 establishing our liability, have you?

1 MR. TENENBAUM: I am not here to answer
2 questions.

3 MR. KARAGANIS: I want to know,

4 MR. TENENBAUM: We are under a 30 (b) 6
5 designation here. You are only entitled to ask
6 questions that have been prepared.

7 MR. KARAGANIS: You have said we are
8 liable.

9 I am asking from the standpoint of the
10 documents that you have compiled as your
11 so-called administrative record, where are the
12 documents that establish American Can's
13 liability?

14 Where are the record items that
15 establish American Can's liability for Midco
16 II? Simple statement.

17 MR. TENENBAUM: If you are seeking
18 information which is going to be a subject de
19 novo trial at the court, I will allow the
20 witness to answer, as I have indicated.

21 If you are seeking questions on the
22 contents of the administrative record issues,
23 it speaks for itself.

24 MR. KARAGANIS: Mr. Tenenbaum, you have

1 already said that on 107 liability as to who
2 arranged for a disposal, that that is a
3 non-record item. You have already indicated
4 that.

5 With respect to 106, for both
6 sufficient cause, and you are trying to jam
7 hundreds of thousands if not millions of
8 dollars of penalties down our throat, we are
9 entitled to confront the evidence that the
10 government has against us.

11 Now, I am asking this witness where is
12 your evidence that my client sent waste to
13 Midco II, period.

14 MR. TENENBAUM: You may answer that
15 question subject to my objection.

16 A. Okay.

17 The evidence is based on the Midco log
18 and the available shipping documents, also
19 on --

20 BY MR. KARAGANIS:

21 Q. Let's stop right there.

22 MR. KARAGANIS: I want to deal with that.

23 I think we have to have him finish the
24 answer. I don't think it is appropriate.

1 MR. KEATING: You are asking each other
2 questions.

3 He is done objecting, and then the
4 answer to the question or not, he said he was
5 going to answer a question three questions ago
6 and hasn't yet.

7 MR. TENENBAUM: He started to answer and he
8 was interrupted. I would like for him to
9 finish his answer.

10 BY MR. KARAGANIS:

11 Q. Mr. Boice, where in the Midco log -- I
12 am going to move on here.

13 MR. TENENBAUM: I am going to strenuously
14 object to not allowing my witness to finish his
15 answer.

16 BY MR. KARAGANIS:

17 Q. Let him finish his answer. Go ahead.

18 A. It is based on the Midco log, the
19 slipping documents, depositions, permit
20 applications and permits, interrogatory
21 responses, responses to requests for
22 admissions, information requests, responses,
23 and other information that might be available.

24 Q. All right.

1 And other information that might be
2 available. All right.

3 A. Yes.

4 O. Now let's go down those categories.

5 Where in the Midco log does it
6 identify that American Can Company shipped
7 hazardous substances to the Midco II site?

8 A. Do you want me to answer that?

9 O. Please.

10 MR. TENENBAUM: If you know the answer and
11 understand the question.

12 Subject to my objection, which is
13 continuing.

14 Do I have a continuing objection, I
15 assume?

16 MR. KARAGANIS: Yes.

17 A. It doesn't -- I have look at the Midco
18 log. I think the Midco log didn't document
19 shipments before the Midco I fire.

20 However, there were depositions that
21 there were trans-shipments between Midco I and
22 Midco II during that period, during some of
23 that period of time.

24 O. Now wait a minute.

1 Are you saying that the Midco log does
2 not indicate that American Can Company shipped
3 waste to Midco II; is that correct?

4 A. It doesn't indicate that.

5 Q. So my statement is correct?

6 A. What is your statement?

7 O. The Midco log does not indicate that
8 American Can shipped waste to Midco II.

9 MR. TENENBAUM: You mean by itself or a
10 combination?

11 MR. FARAGANIS: By itself.

12 A. No, it doesn't identify it.

13 Q. So my statement is correct, is it not?

14 A. Yes.

15 Q. Now, you indicated something about the
16 Midco log does reflect something about
17 trans-shipments from Midco I to Midco II?

18 A. No. I said the depositions that we
19 have.

20 Q. When you say trans-shipments, what do
21 you mean?

22 A. Shipments of material that was
23 accepted at Midco I and shipped to Midco II for
24 disposal.

1 O. And which depositions are those?

2 A. There is Robinson, Ron Crouch and
3 Dehart.

4 O. Where are they shown in the
5 administrative record?

6 A. Okay.

7 There is Robinson, there is Dehart,
8 and Crouch isn't here. It is someplace else in
9 the record, though.

10 O. All right.

11 Now, Dehart is somewhere else in the
12 administrative record?

13 A. I said Crouch.

14 Q. Where is Crouch, please?

15 MR. TENENBAUM: Explain it to him.

16 A. Charles Licht -- no, it is not him.

17 I can't find it.

18 Q. So would it be a fair statement --
19 take your time now -- that the deposition of
20 Mr. Crouch is not in the administrative record
21 for the Midco II 106?

22 MR. TENENBAUM: Objection, the record
23 speaks for itself.

24 MR. KARAGANIS: Please take your time.

1 MR. TENENBAUM: Not an appropriate use of
2 deposition time.

3 BY MR. KARAGANIS:

4 Q. Is it in there or isn't it?

5 A. I would have to look again.

6 Q. Please take your time.

7 I am going to ask you about the Crouch
8 deposition, if it is in the administrative
9 record. If it is not, I may be able to pass
10 it. I am trying to save some time. Please
11 look.

12 MR. TENENBAUM: Liability is decided de
13 novo, not on the basis of the administrative
14 record.

15 MR. KARAGANIS: That's liability for the
16 106, isn't that right, liability for the 106 as
17 well; is that right?

18 MR. TENENBAUM: I am not here to take legal
19 positions.

20 I understand it is your position that
21 liability is de novo. If that is not the case
22 you can advise us.

23 MR. KARAGANIS: It is your position that
24 liability is decided de novo for 106?

1 MR. TENENBAUM: I am not here to answer
2 questions. We have stated our position in the
3 brief.

4 MR. KARAGANIS: I believe that there has
5 been some argument to the effect that liability
6 is limited to the record. We disagree with
7 that. But, if it is limited to the record, I
8 want to find out where in the record the Crouch
9 deposition is that you say is the basis for
10 accusing my client.

11 MR. TENENBAUM: We have not taken the
12 position that the liability issue is limited to
13 the record.

14 MR. HILL: 106 or 107 or both?

15 MR. TENENBAUM: I am not aware that we have
16 taken the position that liability is based on
17 the administrative record.

18 MR. KARAGANIS: Under 106.

19 MR. TENENBAUM: We will be glad to brief
20 the issue for you at an appropriate time.
21 Please point me to the position I have taken to
22 the contrary.

23 MR. KARAGANIS: Mr. Tenenbaum, absent your
24 stipulation that it is a de novo determination,

1 and given the risk that you may assert, as
2 several of defense counsel believe you have
3 asserted, that it is limited to a 106
4 administrative record, I am going to ask again,
5 where is the Crouch deposition on which you
6 base your accusation that American Can took
7 waste to Midco II shown in the Midco II
8 administrative record?

9 MR. TENENBAUM: I am going to object again
10 on the grounds I have already objected on.

11 BY MR. KARAGANIS:

12 O. Go ahead.

13 MR. TENENBAUM: Not -- go ahead.

14 BY MR. KARAGANIS:

15 O. Go ahead.

16 MR. TENENBAUM: Let me add to my grounds
17 for objection that we have already indicated
18 that the liability administrative record in the
19 documents -- some of them are going to be
20 brought here tomorrow morning.

21 If the deponent is really going to
22 answer this question, which really is a waste
23 of time, he really should look through all
24 those documents to see if it is in the

1 documents.

2 MR. KARAGANIS: Excuse me, Mr. Tenenbaum.

3 I am just trying to find out whether
4 the administrative record index may be
5 incomplete. The suggestion thus far is that it
6 may be.

7 MR. TENENBAUM: Again, I don't think there
8 has been any testimony indicating --

9 I have only allowed the witness to
10 answer testimony with respect to your 30 (b) 6
11 designation.

12 Therefore, the witness has not
13 testified as to what was relied upon or
14 considered in connection with the liability
15 portions of the administrative orders as, of
16 course, he could not do under the case law.

17 So I don't agree with your last
18 characterization at all. What the witness said
19 is that Mr. Crouch's deposition was considered
20 in connection with the filing of the second
21 amended complaint.

22 MR. KARAGANIS: If you are trying to stick
23 me with 106 liability for failure to follow
24 your so-called administrative order, then I am

1 entitled to know what evidence the agency
2 relied upon. And this witness has told me they
3 relied upon the deposition of a Mr. Crouch.

4 MR. TENENBAUM: No.

5 This witness has testified and you
6 have marked for identification a 30 (b) 6
7 designation that does not even make reference
8 to administrative orders.

9 This witness has testified with
10 respect to paragraph 22, I believe it is, of
11 the complaint that you referenced in your
12 designation. That's all he testified with
13 respect to.

14 MR. KARAGANIS: Mr. Tenenbaum, is it your
15 opinion that if we haven't sent waste to Midco
16 II that we are liable for a 106 order for Midco
17 II?

18 MR. TENENBAUM: I am not here to answer
19 your questions.

20 MR. KARAGANIS: That's obvious.

21 A. I guess my conclusion it is not in
22 the --

23 Q. It is not in the Midco II 106
24 administrative record, is that correct?.

1 MR. TENENBAUM: Objection. He said it
2 isn't in the index,

3 BY MR. KARAGANIS:

4 Q. All right.

5 So we are clear, based on your
6 examination of the Midco II index, which is
7 contained in Boice Deposition Exhibit No. 3,
8 you cannot find any item for the Crouch
9 deposition, isn't that correct?

10 A. I said I couldn't find any.

11 Q. You did say, right, I couldn't find
12 it, didn't you?

13 A. Right.

14 Q. Now, with respect to Mr. Robinson, Mr.
15 Crouch or Mr. Dehart, as to any of those
16 depositions, were those depositions that were
17 noticed by the government?

18 A. I don't understand the question.

19 Q. Did the government take those
20 depositions?

21 MR. TENENBAUM: If you know.

22 A. I don't know.

23 BY MR. KARAGANIS:

24 Q. Did you ever give notice to any of the

1 respondents to the 106 order that you were
2 going to use deposition testimony against them?

3 MR. TENENBAUM: Objection. I am going to
4 have to insist --

5 MR. KARAGANIS: This is a question of
6 notice. It is a fact.

7 MR. TENENBAUM: Excuse me.

8 Your deposition 30 (b) designation
9 doesn't even mention the administrative order.
10 I am going to have to insist that we adhere to
11 your deposition notice as mentioned.

12 MR. KARAGANIS: Mr. Tenenbaum, the only
13 basis for you finding liability or asserting
14 liability against any of the defendants under
15 the 106, any of the generator defendants, is
16 your assertion that they took waste to those
17 sites.

18 Isn't that correct?

19 MR. TENENBAUM: Excuse me.

20 Your designation does not make any
21 reference to the administrative order. The
22 reference is paragraph 21 of the second amended
23 complaint. If you would like to ask questions
24 with respect to the allegations of paragraph

1 21.

2 MR. KARAGANIS: It says including but not
3 limited to, see inter alia paragraph 21.

4 We are asking do you have any evidence
5 that we are generators. If you don't, it is
6 your under duty as an officer of the court to
7 dismiss us from your 106 claim.

8 MR. TENENBAUM: The witness has testified
9 that we do have such evidence. And he is
10 prepared to testify about that.

11 But, I am going to direct the witness
12 not to answer any further questions.

13 He was not appropriately noticed with
14 respect to the contents of the administrative
15 record with respect to liability on this issue.
16 It is not what your designation said. We have
17 not prepared for that.

18 MR. KARAGANIS: Yes, it does say that.

19 Because to the extent you are seeking
20 to hold us liable for penalties for generating
21 waste and transporting them to the Midco II
22 site under 106, the category clearly does
23 indicate that.

24 MR. TENENBAUM: We disagree, but please try

1 to question the witness in accordance with the
2 designation request.

3 BY MR. KARAGANIS:

4 O. Mr. Boice, prior to asserting that the
5 defendants are liable for fines and penalties,
6 did you advise or give notice to the defendants
7 that the government was going to rely on the
8 depositions of Robinson, Crouch or Dehart?

9 MR. TENENBAUM: Objection. Direct the
10 witness not to answer. This question has not
11 been properly noticed in the Rule 30 (b) 6
12 request.

13 MR. KEATING: Our understanding is that
14 anyone can ask about liability. Any other
15 party has noticed it up for the deposition
16 today.

17 I mean, it is follow-up question and
18 anyone's notice can ask about liability that is
19 an issue.

20 MR. TENENBAUM: I am allowing questions on
21 liability.

22 MR. KARAGANIS: No, you are not.

23 MR. TENENBAUM: The question is not about
24 liability. The question is about the contents

1 of the administrative record which speaks for
2 itself.

3 BY MR. KARAGANIS:

4 O. Mr. Boice, with respect to the
5 administrative record for the 106 order for
6 Midco II, is it correct that for Midco II the
7 government is relying on the depositions of
8 Robinson and Dehart?

9 MR. TENENBAUM: Objection.

10 The witness is directed not to answer
11 with respect to subjects outside of the scope
12 of designation request number 1. And also not
13 to answer with respect to the compilation of
14 administrative records.

15 MR. KARAGANIS: Mr. Tenenbaum, I asked you
16 to produce a witness for all facts or
17 information relating to whether American Can
18 arranged for treatment of or disposal of
19 hazardous wastes at either or both of the Midco
20 sites.

21 MR. TENENBAUM: He has answered that
22 question.

23 MR. KARAGANIS: He said in the Midco II
24 R.O.D., he is relying on Robinson and Dehart's

1 deposition.

2 MR. TENENBAUM: No. I think he said with
3 respect to Midco II, amongst a lot of other
4 materials, he is relying on the Robinson,
5 Dehart and Crouch depositions.

6 MR. KARAGANIS: I am referring to the basis
7 of you asserting liability against American Can
8 for Midco II.

9 You are asserting the basis of
10 liability for American Can that they arranged
11 for or disposed of hazardous substances at the
12 Midco II site, is that not correct?

13 MR. TENENBAUM: I have not stopped him from
14 answering any questions on that.

15 MR. KARAGANIS: Yes, you have.

16 MR. TENENBAUM: No, I have not.

17 BY MR. KARAGANIS:

18 Q. I am asking this witness as to whether
19 before you issued, before the agency issued an
20 administrative order claiming liability for
21 American Can under 106 for the Midco II site,
22 whether they ever gave notice to American Can
23 that they were relying on these depositions?

24 This goes to a gut constitutional

1 question as to whether or not you properly
2 noticed that you were using testimony against a
3 respondent and giving that respondent an
4 opportunity to confront his accusers.

5 It is apparent to me, Mr. Tenenbaum,
6 that you did not. I am entitled to get that
7 information for the record.

8 MR. TENENBAUM: I don't know what your
9 basis for that is.

10 You were given ample opportunity to
11 comment on the administrative record, sir. Did
12 you make a comment that you believe that you
13 had not sent materials to Midco II?

14 MR. KARAGANIS: I am entitled to find out
15 what evidence you used to charge us.

16 MR. TENENBAUM: That is what I am telling
17 you. I am allowing him to answer with respect
18 to whatever evidence we have with respect to a
19 second amended complaint.

20 MR. KARAGANIS: I am asking the witness did
21 the EPA advise or give notice to American Can
22 that EPA was using the depositions of Robinson,
23 Crouch or Dehart as the basis for Section 106
24 liability for American Can at Midco II.

19

1 MR. TENENBAUM: Objection.

2 There has been no basis shown for
3 taking discovery on the administrative process,
4 administrative decision-making process.

5 If you would like to ask the question
6 about the basis for any of the allegations of
7 liability, we will allow him to answer.

8 MR. KEATING: Our objection to that is you
9 are saying that the record speaks for itself.

10 You refused to let us put the record
11 into evidence by indicating -- by any kind of
12 indication on the documents themselves.
13 Therefore, the record is not in, the documents
14 are not in the record.

15 Therefore, it can't speak for itself
16 by definition. And it can't speak for itself
17 unless it is already in the record.

18 When you stop it from going into the
19 record, then you are stopping it from speaking
20 for itself.

21 So what you are doing is you are
22 stopping your own objection. Either let him
23 put the documents into the record and then you
24 can make that objection, or don't make that

1 objection, because the documents aren't in the
2 record. It is a procedural. I am not even
3 going to the guts of the constitution, it is
4 procedure.

5 MR. TENENBAUM: You want the record -- you
6 want the physical record to go before the
7 court? We will be glad to.

8 MR. KEATING: I want it in the record.

9 MR. TENENBAUM: The record is the record.

10 MR. KEATING: This is an evidence
11 deposition that is going before the court. It
12 has to either be in the record or not in the
13 record. You can't have it both ways.

14 MR. TENENBAUM: You want us to put the
15 deposition transcript as an exhibit to this
16 deposition? Please do.

17 MR. KEATING: We will mark the documents as
18 exhibits, all right?

19 MR. TENENBAUM: I will be glad to.

20 Which depositions? I will see if I
21 can get copies of them. Which depositions
22 would you like to mark?

23 MR. KEATING: Let's mark them right now.

24 MR. TENENBAUM: I don't know that we have

1 the deposition exhibits here.

2 As I have indicated, some of the
3 liability documents are going to be brought
4 tomorrow morning. I will be glad to have them
5 marked as exhibits.

6 I think that would be a much better
7 procedure than this type of questioning, I
8 agree.

9 MR. KARAGANIS: My question to you is
10 whether or not specifically my client, American
11 Can Company, was given notice as required by
12 the due process clause that you intended to use
13 certain testimonial or oral statements against
14 American Can for 106 liability.

15 And if you did and failed to give
16 notice, you have violated our due process
17 rights. And we believe we have a right to
18 assert them.

19 What I gather from you is you are
20 trying to stifle discovery into the subject of
21 whether or not a respondent's due process
22 rights were violated, because you are
23 repeatedly instructing this witness not to
24 answer on this subject.

1 MR. TENENBAUM: No.

2 I am just following well established
3 case law, which indicates that you need to get
4 a court order and make an appropriate showing
5 if you want to take discovery into the
6 administrative decision-making process as to
7 how a record was compiled.

8 BY MR. KARAGANIS:

9 O. Mr. Boice, is there any statement in
10 the administrative record for the Midco II 106
11 order that any of the defendants, but
12 specifically American Can, was advised that
13 certain deposition statements or other
14 testimonial statements would be used against
15 them and giving them an opportunity to confront
16 those witnesses?

17 MR. TENENBAUM: I am going to again object
18 and instruct the witness not to answer.

19 Let's move on. You know our position
20 on this. We can get a court ruling on it and
21 do whatever the court tells us.

22 MR. KEATING: Are we going to mark the
23 record?

24 BY MR. KARAGANIS:

1 Q. Mr. Boice, other than the deposition
2 statements -- strike that.

3 To your recollection, do the
4 deposition statements of Robinson, Crouch and
5 Dehart indicate that American Can shipments
6 were trans-shipped from Midco I to Midco II?

7 A. It indicated that there were
8 trans-shipments from Midco I to Midco II but it
9 didn't identify the wastes that were shipped.

10 Q. All right.

11 So would it be correct, then, that
12 neither on the basis of the Midco log or the
13 Robinson, Crouch or Dehart depositions did you
14 have any specific evidence that American Can
15 wastes went to Midco II?

16 MR. TENENBAUM: Objection.

17 Go ahead and answer the question.

18 Vague.

19 A. Could you clarify that?

20 Q. Please repeat the question.

21 A. No, I need clarification.

22 Q. I am sorry whether you need
23 clarification.

24 I am asking you a yes or no question,

1 please repeat the question.

2 MR. TENENBAUM: The question can't be
3 answered yes or no. What do you mean?

4 MR. KARAGANIS: Would you please repeat the
5 question.

6 (The record was read.)

7 MR. KARAGANIS: I am limiting my
8 questioning at this point to the Midco log and
9 the three depositions.

10 MR. TENENBAUM: Object, vague.

11 A. I can't answer that. Too vague.

12 BY MR. KARAGANIS:

13 Q. Do you have any evidence on the basis
14 of the Midco log that American Can wastes went
15 to Midco II, specifically American Can wastes?

16 A. I already answered that question.

17 Q. The answer was what?

18 A. No.

19 Q. You have no such evidence, isn't that
20 correct?

21 A. It is not based on the Midco log.

22 Q. Now, with respect to the Robinson,
23 Crouch and Dehart depositions, is it not
24 correct you have no evidence that American Can

1 wastes went to Midco II?

2 MR. TENENBAUM: I am going to reiterate my
3 objection.

4 You are trying to splice this up. He
5 told you his answer. You asked and he answered
6 it to the best of his ability. You are trying
7 to splice it up into pieces.

8 MR. KARAGANIS: That's right, Mr.
9 Tenenbaum. That's what lawyers do is to find
10 out what evidence nails our client.

11 MR. TENENBAUM: He told you already.

12 MR. KARAGANIS: He just now admitted that
13 one --

14 MR. TENENBAUM: You are asking vague and
15 ambiguous and misleading questions, because you
16 said -- you asked him what is your evidence.
17 He tells what you the evidence is. Then you
18 take it one at a time. You say does that by
19 itself indicate it.

20 It is very unclear. You mean in
21 connection with the other evidence or just
22 alone? It is very misleading.

23 MR. KARAGANIS: Mr. Tenenbaum, you are more
24 than welcome to go back and rehabilitate this

1 witness any in any way you want, if you can.

2 Q. Now, with respect to the three
3 depositions, Mr. Boice, is it not correct that
4 neither the Robinson nor the Crouch nor the
5 Dehart depositions provide evidence that
6 American Can wastes went to Midco II?

7 MR. TENENBAUM: Same objection.

8 BY MR. KARAGANIS:

9 Q. Please answer the question.

10 A. I don't think I can answer it.

11 Q. Mr. Boice, based on the Robinson,
12 Crouch and Dehart depositions, do you have any
13 evidence in any of those depositions that
14 American Can wastes went to Midco II?

15 MR. TENENBAUM: Objection.

16 A. I can't answer the question.

17 BY MR. KARAGANIS:

18 Q. Is that because you have no such
19 evidence?

20 A. No.

21 Q. Do you have evidence from the
22 Robinson, Crouch and Dehart depositions that
23 American Can wastes, explicitly American Can
24 wastes went to Midco II?

1 A. I would have to read them again.

2 Q. All right.

3 Would you please refresh your
4 recollection over the evening, because I will
5 be asking you this same question tomorrow
6 morning.

7 Now, I believe you indicated that
8 there were documents such as permits which
9 established the fact that American Can wastes
10 went to Midco II.

11 Which permits are you referring to?

12 A. I believe that is privileged
13 information.

14 MR. KARAGANIS: Which privilege are you
15 asserting, counsel?

16 You are trying to set my client a huge
17 fine. You are now claiming a privilege I never
18 heard of before.

19 MR. TENENBAUM: I am not sure what the
20 witness is referring to.

21 I think your question had a premise in
22 it that confused the witness. He mentioned
23 permits.

24 I am not so sure he mentioned permits

1 with respect to -- I think more likely he
2 mentioned permits with respect to the nature of
3 the wastes that were sent to Midco II.

4 You asked a question which had a
5 compound element to it. One of the elements
6 was whether the substances were hazardous.

7 MR. KARAGANIS: Excuse me.

8 I asked earlier for the witness to
9 identify the documents that served as the basis
10 for saying that American Can waste went to
11 Midco II, that it was, therefore, liable under
12 106. He said the Midco log, shipping
13 documents, permits, interrogatory responses,
14 responses to requests for documents,
15 information requests responses, and other
16 information.

17 I am going down the list.

18 MR. TENENBAUM: I know. I believe the
19 question he answered was the one in your
20 notice.

21 That was factual information relating
22 to whether American Can Company arranged for
23 the treatment or disposal of hazardous
24 substances at either or both the Midco sites.

1 MR. KARAGANIS: That's correct.

2 Q. I am asking now did the permits
3 provide you any information that American Can
4 Company arranged for the treatment or disposal
5 of hazardous substances at Midco II?

6 A. I would have to review all the
7 documents.

8 Q. Please bring them tomorrow because
9 this is the basis on which you are seeking
10 fines and sanctions against my client, and I am
11 entitled to know your evidence.

12 MR. TENENBAUM: Again let me object on the
13 same grounds that I have indicated in my
14 deposition notice.

15 Let me further state that discovery is
16 ongoing as well in the case.

17 BY MR. KARAGANIS:

18 Q. With respect to interrogatory
19 responses, it is clear that as of today, as of
20 the date that you are taking the deposition,
21 that you have no recollection today without
22 going back and refreshing your recollection
23 that there is any evidence in the interrogatory
24 responses tying American Can Company to Midco

1 II?

2 A. I would have to read them over.

3 Q. All right.

4 So that my statement is correct, that
5 without reading them over you have no
6 independent recollection today that ties
7 American Can Company to Midco II; isn't that
8 right?

9 A. Yes.

10 Q. Now, Mr. Boice, directing your
11 attention to the Midco II 106 order, would you
12 find that for me, please.

13 Mr. Boice, directing your attention to
14 a document you have identified as the Midco II
15 106 order, which has the number 0000018 and is
16 contained in a tab marked, "Pleadings and
17 orders," in a binder marked, "USEPA
18 administrative record index update number 3,
19 documents for unilateral administrative order
20 Midco II, February 1990, Part 3 of 3."

21 Directing your attention to the index
22 to administrative record for the Midco II 106
23 order and the Midco II 106 order itself, the
24 index being located in Boice Deposition Exhibit

1 No. 3.

2 Is there any evidence anywhere in this
3 record which tells American National Can
4 Company or any other defendant what action is
5 necessary at Midco II to abate any actual or
6 threatened release of a hazardous substance
7 which causes or may cause an imminent and
8 substantial endangerment to the public health
9 or welfare or to the environment?

10 MR. TENENBAUM: Objection, administrative
11 record-review issues.

12 I direct the witness not to answer,
13 subject to our previous objections.

14 MR. KARAGANIS: Again, Mr. Tenenbaum, I
15 will tell you that I have as an officer of the
16 court and as counsel for my client gone through
17 your administrative order, and can find no
18 evidence of any statement by the government as
19 to what action is necessary to abate either an
20 actual or threatened imminent and substantial
21 endangerment to the public health or welfare or
22 the environment.

23 I have asked you repeatedly to
24 identify what such action is, I can't find it

1 in the administrative record and you refuse to
2 allow this witness to identify what such action
3 is.

4 MP. TENENBAUM: The record speaks for
5 itself.

6 In a accordance with the established
7 case law, you are not entitled to ask that
8 question at this deposition. I appreciate your
9 trying to make a record for your use in the
10 case.

11 BY MR. KARAGANIS:

12 Q. Mr. Boice, directing your attention to
13 the two binders, the green binders marked
14 update 4. Let's turn first to the Midco II
15 binder for update 4.

16 These documents are not only in the
17 administrative record for the Midco II R.O.D.
18 of June 30, 1989, but they are also part of the
19 administrative record for the Midco 106 of
20 December 29, 1989, are they not?

21 A. That's correct.

22 Q. All right.

23 And then it is a fair statement that
24 as to the Midco II 106 administrative record,

1 the documents contained in update number 4 were
2 not identified and enclosed in the
3 administrative record for the Midco II 106
4 order until May of 1989, isn't that right?

5 MR. TENENBAUM: I am sorry. I probably
6 have an objection to that but I couldn't pick
7 up the exact wording of the question.

8 Can I have of it read back, please.

9 (The record was read.)

10 MR. KARAGANIS: The question should be
11 until May of 1990.

12 Q. Isn't that correct.

13 MR. TENENBAUM: Objection, vague. But you
14 can answer.

15 A. That's right. They weren't
16 incorporated into a separate document or
17 gathered into a separate document. Right.

18 BY MR. KARAGANIS:

19 Q. They were not identified as being part
20 of the Midco II, 106 administrative record
21 until May of 1990, isn't that right?

22 A. That's right.

23 MR. SHELDON: Could you please read back
24 the two answers of the witness? He spoke in a

1 low voice and was not audible to me.

2 (The record was read.)

3 Thank you.

4 BY MR. KARAGANIS:

5 Q. Directing your attention to the Midco
6 I 106 order, and the document binder marked
7 update number 4 for Midco I, May 1990.

8 As to the Midco I administrative
9 order, is it not correct that the documents in
10 update number 4 were not included in the Midco
11 I 106 administrative record and identified as
12 being part of that record until May of 1990?

13 MR. TENENBAUM: Objection, compound and
14 vague.

15 A. Can you clarify that?

16 BY MR. KARAGANIS:

17 Q. Yes.

18 The documents that are enclosed as
19 update number 4 for Midco I, which you have
20 identified as being part of the Midco I 106
21 administrative record, these documents were not
22 included in that Midco I 106 administrative
23 record and identified as being part of that
24 record until May of 1990; isn't that right?

1 MR. TENENBAUM: Same objection.

2 A. It is correct that they weren't
3 identified as part of the record.

4 BY MR. KARAGANIS:

5 O. Thank you.

6 That was not until May of 1990; isn't
7 that right?

8 A. Right.

9 MR. KARAGANIS: Let's take a five minute
10 break.

11 (Whereupon a short recess was had.)

12 O. Mr. Boice, take your chair. Back on
13 the record.

14 Mr. Tenenbaum, I have the --

15 A. Can I clarify something first?

16 What I referred to as the Crouch
17 deposition is listed in the record under the
18 Midco I and Midco II liability documents under
19 an interview which is a privileged document
20 withheld from public portion of the
21 administrative record.

22 Q. Wait a minute.

23 I am now referring to Midco I 106,
24 privileged documents withheld from public

1 portion of administrative record. You are
2 referring to a Crouch deposition?

3 A. That is my -- yes.

4 MR. TENENBAUM: I don't know if it says
5 that.

6 MR. KARAGANIS: His testimony said a Crouch
7 deposition.

8 MR. TENENBAUM: Your question said Crouch
9 deposition.

10 A. I am saying it was wrong. It was an
11 interview.

12 BY MR. KARAGANIS:

13 O. This is an interview with a witness as
14 the basis of the assertion that wastes from
15 American Can went to Midco II; is that right?

16 A. That's part of it. Yes.

17 O. All right.

18 So I am going to ask -- since those
19 are being used as the basis for asserting
20 liability against my client, I am going to ask
21 for disclosure of those notes, since the facts
22 contained in those notes were used as the basis
23 of asserting liability against my client.

24 MR. TENENBAUM: You have had the

1 opportunity to take the deposition of this
2 person.

3 MR. KARAGANIS: No. I did not know until
4 this moment that the reference to Midco notes
5 from interview with potential witness referred
6 to Mr. Crouch.

7 Q. I will ask the witness for the record,
8 is there anywhere in the record or the various
9 records that you have identified here --
10 hopefully they don't have any children with
11 respect to these various records -- whether or
12 not the item noted as privileged documents
13 withheld from public portion of administrative
14 record, i.e., Midco notes from interview with
15 potential witness, referred to a Mr. Crouch?

16 MR. TENENBAUM: Objection.

17 BY MR. KARAGANIS:

18 Q. Answer the question, please.

19 A. What is the objection?

20 MR. TENENBAUM: You can go ahead and
21 answer. There is nothing inappropriate with
22 that.

23 He is entitled to know whether I
24 direct you to answer or not. And the answer is

1 that I do not.

2 If you understand the question and you
3 know the answer you can -- subject to my
4 objection, you can go ahead and answer.

5 A. My understanding is that that refers
6 to Mr. Crouch. Yes.

7 BY MR. KARAGANIS:

8 Q. Was Mr. Crouch ever identified as
9 being the individual referred to in this item
10 Midco notes from interview with potential
11 witness under privileged documents withheld
12 from public portion?

13 A. You mean on this particular page?

14 Q. No. In any portion of any of the
15 Midco I or Midco II administrative records.

16 Was Mr. Crouch's interview, which
17 allegedly is serving as the basis for liability
18 in one more record -- was that ever identified
19 as being Mr. Crouch?

20 A. It is in the record, yes.

21 Q. Where is it identified as being Mr.
22 Crouch?

23 A. In the record.

24 Q. Where?

1 A. Privileged portion of the record.

2 Q. Oh. In the item that isn't shown to
3 the public or to the defendants.

4 If you go back and look at those notes
5 you can find it is Mr. Crouch; is that right?

6 A. Right.

7 O. But neither the defendants nor the
8 public has ever known it is Mr. Crouch, isn't
9 that right?

10 MR. TENENBAUM: Same objection.

11 A. Right.

12 BY MR. KARAGANIS:

13 O. Okay.

14 And isn't it a fact that you never
15 disclosed it to the defendants or the public
16 that it was Mr. Crouch, isn't that right?

17 MR. TENENBAUM: Same objection.

18 A. As far as I know we didn't, yes, until
19 now.

20 BY MR. KARAGANIS:

21 O. Isn't it a fact that you are using
22 statements by Mr. Crouch to try to establish
23 the liability of my client, American Can
24 Company; isn't that right?

1 A. That's correct.

2 MR. TENENBAUM: I will say for the record
3 that Mr. Crouch had his deposition taken twice
4 in this case, once in which notice was given to
5 American Can Company.

6 You have had an ample opportunity to
7 examine Mr. Crouch.

8 MR. KARAGANIS: Mr. Tenenbaum, you are now
9 claiming that a secret document was the basis
10 of establishing on a so-called record liability
11 under 106, the liability of my client.

12 You withheld the identity of a secret
13 witness. You have not made it known to the
14 defendants that this witness was the basis of
15 liability being used against American Can
16 Company.

17 MR. TENENBAUM: Mr. Crouch is well known in
18 this case. Anybody that knows anything about
19 their case knows about Mr. Crouch.

20 MR. KARAGANIS: Mr. Tenenbaum, I am sorry.

21 MR. TENENBAUM: It is my understanding that
22 on liability issues you have taken the position
23 that you have a right to de novo trial on them.

24 So I think you will have ample

1 opportunity to present whatever evidence you
2 want with respect to the statements of Mr.
3 Crouch.

4 MP. KEATING: Are you stipulating we will
5 get a de novo trial?

6 MR. TENENBAUM: Your position is that --

7 MR. KARAGANIS: Mr. Tenenbaum, what is your
8 position?

9 MR. KEATING: If that is our position, you
10 can say you can do it at a de novo trial. What
11 if we loose, maybe.

12 BY MR. KARAGANIS:

13 Q. Mr. Boice, based on your secret
14 reading of the secret notes of the secret
15 interview with Mr. Crouch --

16 MR. TENENBAUM: Objection to the
17 characterization.

18 BY MR. KARAGANIS:

19 Q. Is there anything in those interview
20 notes --

21 MR. BERMAN: We object to the
22 characterization.

23 MR. TENENBAUM: I am not going to allow him
24 to answer.

1 BY MR. KARAGANIS:

2 O. Is there anything in those interview
3 notes that establishes that American Can
4 Company sent hazardous substances to the Midco
5 II site?

6 MR. TENENBAUM: Objection, attorney work
7 product and record issue, and direct him not to
8 answer.

9 MR. KARAGANIS: You are trying to fine my
10 client \$25,000 a day, sir, on the grounds that
11 we didn't have sufficient cause to not obey an
12 administrative order on which you say we have
13 liability.

14 You are using a secret witness with
15 secret notes. I can't believe it.

16 MR. TENENBAUM: Mr. Crouch is not a secret
17 witness. His deposition has been taken and his
18 deposition is public.

19 MR. KARAGANIS: The deposition isn't the
20 record item that is being referred to here.

21 It is an interview with Mr. Berman
22 that is being referred to as the evidentiary
23 item which is the basis of our liability and
24 you haven't disclosed it.

1 MR. TENENBAUM: You will have ample
2 opportunity to consider liability in this case.
3 We don't need to address that now. Let's move
4 on.

5 MR. KARAGANIS: Mr. Tenenbaum, this is what
6 discovery is about.

7 You have accused my client of doing
8 something, I entitled to go into it.

9 I will ask specifically that if you
10 are intending to use the Crouch notes as the
11 basis of liability in this case, that you
12 immediately produce the Crouch notes.

13 If you are not intending to use the
14 Crouch notes as a basis of liability against my
15 client, so stipulate immediately.

16 MR. TENENBAUM: We have allowed this
17 witness to answer your general questions with
18 respect to liability.

19 You have not made any request with
20 respect to a designation with respect to the
21 contents of administrative orders which would
22 be objectionable.

23 The Crouch interview contains attorney
24 work product, attorney's materials. Indeed,

1 much of the government's case contains the work
2 of attorneys, the work product of attorneys.

3 MR. KEATING: But a statement of another
4 party is not work product.

5 MR. FORT: Let's just ask questions. Mr.
6 Tenenbaum has his own view of this law.

7 MR. TENENBAUM: Excuse me. I don't believe
8 there has been any question of a statement.
9 These are interview notes.

10 MR. KEATING: Interview. All right.

11 You are talking about a statement
12 though, when you take it from someone else.

13 BY MR. KARAGANIS:

14 Q. Mr. Boice, did you use the notes of
15 Crouch to determine American Can's liability
16 with respect to Midco II?

17 A. To some degree, yes.

18 Q. When I say you, I am referring to EPA,
19 is that understood?

20 A. Yes.

21 MR. KARAGANIS: Pending the arrival of the
22 liability documents, I am going to recess this
23 area at this time until I have a chance to
24 review the liability documents which are coming

1 over tomorrow. And I will revisit it upon
2 examination of the liability documents.

3 I will turn over the questioning to
4 any of my co-counsel who wish to examine this
5 area of inquiry at this time.

6 DIRECT EXAMINATION

7 CONTINUED

8 BY MR. FORT:

9 O. Mr. Boice, I have a few questions that
10 relate to this as well, as well as areas that I
11 was prepared to cover earlier this morning
12 before we got into this discussion of what the
13 record is.

14 O. These privileged Crouch notes, is
15 Desoto named in them?

16 MR. TENENBAUM: I am sorry, the privilege,
17 they are attorney work product notes.

18 They are obviously not subject to
19 questioning of attorney work product.

20 MR. KARAGANIS: He has already said that
21 American Can is indicated in there.

22 And I would like to know whether
23 Desoto is in there?

24 MR. TENENBAUM: I don't believe he has

1 testified to that. I would not allow him to
2 testify to the contents of --

3 The only thing he has testified as to
4 that is they are referenced in the record.

5 BY MR. FORT:

6 O. Is Desoto named in the notes?

7 MR. TENENBAUM: Objection, direct the
8 witness not to answer. That is attorney work
9 product material.

10 MR. KARAGANIS: He is entitled to find out
11 if they did the same tactic with respect to
12 Desoto as they did with American Can.

13 MR. TENENBAUM: The question that he is
14 asked is different than the question that was
15 asked previously.

16 If he wants to ask --

17 MR. FORT: Look, thank you. Would you just
18 hold it, Mr. Tenenbaum. There is more of you
19 in this record than there is anybody else.

20 I thought this was Mr. Boice's
21 deposition. But let me ask that question.

22 O. Did you use the Crouch notes, the
23 interview notes of Mr. Crouch, to establish
24 liability in whole or in part of any of the

1 other defendants besides American Can?

2 A. Yes. To some degree.

3 Q. Okay.

4 And did you use those notes to some
5 degree with respect to my client, Desoto?

6 A. Yes.

7 Q. And in what way did you use them to
8 establish liability of Desoto?

9 MR. TENENBAUM: Object, direct the witness
10 not to answer. Attorney work product.

11 BY MR. FORT:

12 Q. Mr. Boice, are you a lawyer?

13 A. No.

14 Q. Did you review these notes?

15 A. Parts of them, yes.

16 MR. FORT: I think if there was a privilege
17 it's certainly been waived by a non-lawyer
18 reading them.

19 Q. Do you know who else reviewed the
20 notes?

21 MR. TENENBAUM: What do you mean a
22 non-lawyer reading notes, of his own attorney?

23 MR. FORT: It is called the attorney work
24 product privilege.

1 MR. TENENBAUM: There is no waiver when --

2 MR. FORT: It is a very easily waived
3 privilege, sir.

4 MR. TENENBAUM: The attorney work product
5 is the most difficult of any privilege to
6 waive.

7 MR. KARAGANIS: Mr. Tenenbaum, this witness
8 if he used the notes, used them to glean facts
9 from those notes which were then used as the
10 basis of a factual establishment of liability
11 against these defendants.

12 You have not --

13 MR. TENENBAUM: We have not established
14 whether this witness had anything to do with
15 the liability determination.

16 MR. KARAGANIS: On behalf of EPA, he has so
17 stated on behalf of EPA that facts were gleaned
18 from the notes, facts which admittedly are
19 missing from the record in this case, because
20 you failed to identify those facts with respect
21 to the notes of the interview.

22 So all you have with respect to those
23 facts is the fact that a privileged interview
24 has taken place, and the facts are missing from

1 the record of the case.

2 So there again is a basis for going
3 beyond your mythical record to find out what
4 the basis of liability here is.

5 MR. TENENBAUM: This is a liability issue
6 and it is different from the other kinds of
7 issues that we have been talking about all day
8 long.

9 BY MR. FORT:

10 O. Mr. Boice, what kind of uses have you
11 put the Crouch notes to after you read them?

12 MR. TENENBAUM: I am not going to allow the
13 witness to answer any more questions about the
14 contents of the Crouch notes, as I have not
15 allowed him to answer any thus far.

16 I will continue to direct him to not
17 answer.

18 BY MR. FORT:

19 Q. Did you review those notes before you
20 came here today for your deposition?

21 A. A part of them. Yes.

22 O. And when did you review those notes?

23 A. Yesterday.

24 O. And you used them to refresh your

1 memory for purposes of this deposition?

2 A. Yes.

3 Q. Now, can you recall the part of the
4 notes that you reviewed?

5 A. What do you mean?

6 Q. How big are the notes?

7 He didn't understand the question.

8 How big a document are these notes?

9 A. I don't know. I only saw part of it.

10 Q. You were allowed only to see part of
11 it, you only saw part of it?

12 A. That's right.

13 Q. How did you come to see part of it and
14 not all of it?

15 MR. TENENBAUM: Objection. Goes into
16 attorney-client communications.

17 Counsel, why don't we stipulate for
18 the record that we'll review the interview
19 tonight and we will see whether or not we can
20 produce it to you tomorrow morning.

21 Then you can resume your questioning
22 on this subject tomorrow morning.

23 MR. FORT: Fine.

24 Q. Going to Exhibit No. 3, which is the

1 certification of the various items in the
2 administrative record. There are really
3 several different indices included in here,
4 correct?

5 A. I don't understand your question.

6 Q. Do you have the exhibit there?

7 MR. KARAGANIS: Here is Exhibit 3. Make
8 sure it stays together. We need a clip on it.

9 BY MR. FORT:

10 Q. Directing your attention to Exhibit
11 No. 3, in the upper lefthand corner of the
12 various pages of the exhibit is a date, is
13 there not?

14 A. On most of it. Yes.

15 Q. Do you know what that date refers to?

16 A. It is probably the date when it was
17 printed out on the computer.

18 Q. So that before the date that the
19 computer printed this document out, the
20 document didn't exist or the update didn't
21 exist, right?

22 A. It wasn't finalized.

23 Q. It wasn't final.

24 Until the listing or the index was

1 finalized, you weren't going to make that
2 available to the public, right?

3 A. Well, it was -- most of the documents
4 were available to the public via Freedom of
5 Information Act request, but they weren't
6 compiled.

7 O. To get an F.O.I. request, if I asked
8 for all of the documents of EPA with respect to
9 the Midco I or Midco II sites, what would I get
10 back as a response?

11 MR. TENENBAUM: Objection, hypothetical.

12 MR. FORT: No, it is not hypothetical.

13 O. What would I get back?

14 MR. TENENBAUM: No foundation.

15 A. It is a hypothetical question.

16 MR. TENENBAUM: If you know the answer you
17 can answer.

18 If you don't know the answer say you
19 don't know, as the case may be.

20 A. I would probably call you up and ask
21 you, try to clarify what you want.

22

23 BY MR. FORT:

24 O. You would ask us to be more specific

1 about what we were looking for, right?

2 A. Yes.

3 Q. But until this date, and I am
4 referring you to update number 4 that we have
5 talked about, for Midco I 106 and Midco I
6 R.O.D., the date there is May 20, 1990,
7 correct?

8 A. Correct.

9 Q. Before this time, this part of the
10 administrative record index did not exist,
11 correct?

12 A. It hadn't been finalized.

13 Q. It had not been finalized.

14 Until the administrative record is
15 finalized, is it an administrative record that
16 a member of the public or one of the defendants
17 could come and look at?

18 A. It could have been accessed through,
19 like I said before -- through the Freedom of
20 Information Act.

21 Q. Okay.

22 So that if I called you up or put in
23 an F.O.I. request in prior to the date
24 indicated and asked for your draft

1 administrative record index update number 4,
2 assuming I was prescient enough to understand
3 that you had a new update coming, would you
4 give it to me?

5 MR. TENENBAUM: I am sorry.

6 You are asking him about the index or
7 the documents that are referred to in the
8 index?

9 MR. FORT: I am asking about the index.

10 MR. TENENBAUM: I am sorry, I didn't
11 understand that at all.

12 MR. FORT: I am sorry. I just talking
13 about the administrative record. The
14 compilation of the administrative record.

15 Q. The administrative record index update
16 number 4 did not exist until May 20, 1990,
17 correct?

18 A. Right. Not in final form.

19 Q. Okay.

20 While the documents predated May 20,
21 1990, you did not have these documents in the
22 administrative record until sometime after May
23 20, 1990 --

24 MR. TENENBAUM: Objection.

1 BY MR. FORT:

2 Q. -- correct?

3 MR. TENENBAUM: Objection.

4 MR. FORT: Can I finish before you object?

5 MR. TENENBAUM: I got to get my objection
6 in before him.

7 MR. FORT: That is your problem, not mine.

8 Q. Did you hear the question?

9 A. Would you repeat that.

10 Q. Can you read it back, please.

11 (The record was read.)

12 MR. TENENBAUM: Objection.

13 What do you mean by in the
14 administrative record?

15 BY MR. FORT:

16 Q. You can answer the question.

17 A. What do you mean by in the
18 administrative record?

19 Q. What is the administrative record to
20 you, Mr. Boice?

21 A. It is defined in the National
22 Contingency Plan.

23 Q. So when you use the word
24 administrative record, you are talking about

1 that part of the National Contingency Plan, 40
2 CFR 300.800 and the following section; is that
3 what you are talking about?

4 A. I don't know the section.

5 Q. But you are talking about what is
6 published in the Federal Register, correct?

7 A. Right.

8 Q. All right.

9 When you say administrative record,
10 that is your understanding of the term
11 administrative record?

12 A. Right.

13 Q. Okay.

14 Now, my question is, until the index
15 was prepared, were the documents listed in that
16 index in the administrative record?

17 A. No.

18 They were in the record, but they
19 hadn't been compiled yet. Separate area.

20 Q. Where were they in the record?

21 A. They were in various files in the
22 agency.

23 Q. They were in the files of the agency.
24 But they had not yet gotten into one of these

1 boxes or a binder, had they?

2 A. That's right.

3 Q. They were not yet in the binder?

4 A. That's right.

5 Q. Okay.

6 So if somebody came in to look at the
7 administrative record, they wouldn't find those
8 documents as of May 19, 1990, would they?

9 A. That's correct.

10 Q. Now, the documents that are listed on
11 index update to index number 4 that we were
12 just referring to, predate obviously May 19,
13 1990; is that right?

14 A. Yes.

15 Q. Okay.

16 Now, directing your attention to one
17 of the earlier pages, I think it is for update
18 number 3, do you know when update number 3 for
19 the administrative record index, Midco I, Gary,
20 Indiana --

21 We don't have a page number on these.
22 I am looking at page number 1, with a 2590
23 underneath it.

24 Do you know when that administrative

1 record index was created or finalized?

2 A. It would have been sometime in
3 February 1990.

4 Q. Prior to February 5, 1990, the
5 documents listed in administrative update
6 number 3 would not have been in the
7 administrative record at that time, right?

8 MR. TENENBAUM: Object, vague.

9 A. Yes. They were in the administrative
10 record.

11 BY MR. FORT:

12 Q. They were in the administrative
13 record?

14 A. Yes.

15 Q. Where in the administrative record?

16 A. In various files in the agency.

17 Q. They were spread around the agency
18 offices?

19 A. Right.

20 Q. But they weren't in the document
21 repository where the administrative record was?

22 A. That's right.

23 Q. In order to get to these documents you
24 had to request them formally via a Freedom of

1 Information Act request, correct?

2 A. Right.

3 Except the ones that were already
4 available to the Midco trustee.

5 Q. Well, as to Midco trustee --

6 A. I said most, a large number of the
7 documents, even most of the documents were
8 already available to the Midco trustee before
9 we compiled the administrative record, or they
10 are public documents in cases of guidance
11 documents.

12 Q. Okay.

13 I haven't asked you whether or not
14 anybody had these.

15 The question is whether or not they
16 were in the administrative record that has been
17 referred to, and the answer was they were not
18 in the formal administrative record as that
19 term is used in the National Contingency Plan
20 and in the case of update number 3 until
21 sometime after February of 1990?

22 MR. TENENBAUM: Objection, mischaracterizes
23 his answer.

24 BY MR. FORT:

1 Q. Is that correct?

2 A. No.

3 Q. How would you correct it to make it
4 accurate?

5 A. It was part of the administrative
6 record, but it hadn't been compiled into a
7 separate document.

8 Q. Those are two terms of administrative
9 record that you are using. One is that some
10 place at 230 South Dearborn or in the other
11 offices of EPA the document exists.

12 Is that your definition of
13 administrative record now?

14 A. The definition of the administrative
15 record in the National Contingency Plan.

16 Q. The definition of an administrative
17 record in the National Contingency Plan is
18 what; wherever the document is, the document is
19 part of the administrative record?

20 MR. TENENBAUM: I am going to object to
21 that.

22 MR. FORT: That's the question.

23 MR. TENENBAUM: I am going to object to
24 this line of questioning.

1 I think it is clear what the witness
2 is saying. You are not entitled to ask that.

3 I have a continuing objection to this
4 type of questioning on the compilation of the
5 record.

6 It is clear that the witness is
7 distinguishing between the contents of the
8 administrative record and the compilation of
9 the administrative record, and the indexes to
10 the administrative record. That seems pretty
11 clear to me.

12 Your questions are not distinguishing
13 between those, which is giving rise to the
14 ambiguity.

15 MR. FORT: I see.

16 You say as long as the document has a
17 date on it that predates some magic date, that
18 it can be put into the administrative record
19 whenever the agency gets around to it.

20 MR. TENENBAUM: No.

21 The agency compiles the administrative
22 records in accordance with the procedures.
23 That is all I am saying.

24 MR. FORT: Thank you.

7

1 O. Mr. Boice, what are the procedures
2 that the agency uses to establish the
3 administrative record, being the record that
4 you brought with you today?

5 MR. TENENBAUM: Objection. It seeks
6 discovery of testimony on the compilation of the
7 record. I will direct the witness not to
8 answer that.

9 MR. KARAGANIS: Mr. Tenenbaum, I have
10 repeatedly referred to agency procedures for
11 compilation of an administrative record. We
12 are entitled to know what those procedures are.
13 Have you not written procedures somewhere?
14 Let's hear them. Let's get them out on the
15 table.

16 You keep hiding behind some vague
17 declaration of agency procedures. What are
18 they? And bring them tomorrow, please, so we
19 can examine the witness about them.

20 MR. TENENBAUM: You have not made a showing
21 of entitlement to discovery on the compilation
22 of the record.

23 MR. KARAGANIS: They should be in the
24 record, Mr. Tenenbaum. If there are agency

1 procedures that govern the compilation of those
2 four records, those agency procedures should be
3 part of it, if they are not part of it.

4 MR. TENENBAUM: If there are agency
5 procedures that are written down on the
6 compilation of the record, then they are likely
7 published in the Federal Register and are
8 public documents.

9 BY MR. FORT:

10 Q. Mr. Boice are there procedures that
11 are published in the Federal Register for
12 establishing what is in the administrative
13 record?

14 MR. TENENBAUM: If you know.

15 A. Yes.

16 BY MR. FORT:

17 Q. And what are those procedures?

18 A. It is in the National Contingency
19 Plan.

20 Q. The National Contingency Plan has very
21 specific provisions about what goes into the
22 administrative record, right?

23 A. I don't know whether I would
24 characterize them as specific. There is quite

1 a bit of judgment involved.

2 MR. KARAGANIS: Again --

3 BY MR. FORT:

4 Q. Mr. Boice, let me ask you this. The
5 record of decision was signed on June 30, 1989,
6 correct?

7 A. Right.

8 Q. Both records of decision were signed
9 on that date, right?

10 A. Correct.

11 Q. Why has it taken from June 30 of 1989
12 until what is today, June 5 -- still -- of
13 1990, almost a year, or until May 23 when you
14 swore out your certificate, for the agency to
15 figure out what the administrative record is?

16 MR. TENENBAUM: Object.

17 I will instruct the witness not to
18 answer. This relates to compilation of the
19 record.

20 MR. KEATING: Our objection is it is not
21 completed as of yet.

22 MR. FORT: Mr. Tenenbaum, you are
23 instructing him not to answer?

24 MR. TENENBAUM: Yes, I am.

1 The record hasn't been certified to
2 the court. It is pleaded to the best of the
3 knowledge of the agency.

4 MR. FORT: All right. Let me hear the
5 speech.

6 Q. Mr. Boice, so that we don't have any
7 ambiguity here as to the other items in your
8 administrative record, let's start at the
9 earliest part of the administrative record for
10 Midco I.

11 Those documents were collected as I
12 read this document sometime prior to April 13,
13 1989.

14 Does that seem reasonable to you, does
15 that comport with your recollection?

16 MR. TENENBAUM: What was the question,
17 please?

18 BY MR. FORT:

19 Q. I will direct your attention to the
20 administrative record index for Midco, page
21 number 12 has the date of April 26, 1989. I
22 would assume from what you said before that
23 that means that that update was done in April
24 of '99, is that correct?

1 A. That is not correct.

2 Q. When was the update done?

3 A. It was a long time ago. I would have
4 to look it up.

5 Q. The indication on the printing here is
6 the earliest one is March 1989, we have other
7 ones through April of '99 for the record, the
8 basic record, right?

9 A. But I think this was done before that.
10 I don't know, it was at a later date.

11 Q. It was done before April 18, 1989?

12 A. I think so.

13 Q. You made the formal index and printed
14 it up on April 18, 1989?

15 A. I'm not sure.

16 MR. TENENBAUM: Objection.

17 A. That one is correct.

18 BY MR. FORT:

19 Q. All right.

20 So the label or the legend in the
21 upper lefthand corner shows the date that this
22 index was prepared, correct, and finalized?

23 A. Right, approximately.

24 Q. I mean approximately, a day or two?

1 A. Probably a few days, before it was put
2 in the repository.

3 O. Okay.

4 Is the date on there the date it was
5 prepared or the date it went into the
6 repository?

7 A. Probably the date it was printed out
8 by our contractor.

9 O. Okay.

10 What is the procedure, you prepare the
11 record and send it to the contractor to do the
12 printing and the copying and putting it into
13 the public file room?

14 MR. TENENBAUM: Objection, compilation of
15 the record. Direct the witness not to answer.

16 BY MR. FORT:

17 O. Okay.

18 Mr. Boice, I have got some other
19 questions here about the accuracy of this
20 information, frankly.

21 Get your copy of Exhibit NO. 3 before
22 you, if you would.

23 If you would look at the update for
24 Midco II, page number 4. 4/26/89 is the date

1 it was printed?

2 A. Update 2.

3 Q. Just update. The first update for
4 Midco II.

5 A. On page 4?

6 Q. Yes.

7 I would like you to see if you could
8 locate for me the document number 38, which is
9 supposed to be a review of Midco II draft FS
10 which you sent to Dr. Ball of ERM.

11 MR. TENENBAUM: Document number 38.

12 I am going to object as I have before
13 to this process. If the witness can quickly
14 find it, fine. If not, I will suggest that we
15 allow the witness to find it.

16 MR. FORT: Mr. Tenenbaum, none of us have
17 been able to find it. There is either
18 something wrong with our eyesight, which we
19 would like to know if there is, or it is the
20 record that you have certified is not accurate.

21 MR. TENENBAUM: I wish you if you have
22 trouble --

23 A. We certified the index, we didn't
24 certify the documents.

1 MR. KARAGANIS: Did you get that on the
2 transcript.

3 MR. TENENBAUM: No question pending.

4 MR. HILL: I would like the answer read
5 back.

6 MR. KARAGANIS: The statement is on the
7 record.

8 MR. FORT: Excuse me. Just a minute, I
9 would like that answer of Mr. Boice's read
10 back.

11 MR. TENENBAUM: There is no question
12 pending.

13 MR. FORT: Let the court reporter read it
14 back, please.

15 (The record was read.)

16 MR. TENENBAUM: If I could state for the
17 record --

18 MR. FORT: I don't think there is a
19 question pending and there is no reason to
20 object.

21 MR. TENENBAUM: I am not objecting to
22 anything.

23 I just want to respond to your remarks
24 about how you couldn't find these documents.

1 This is the first time that I have
2 been apprised that you have had any difficulty
3 in identifying this document.

4 I would suggest that the better -- if
5 I can finish -- the better procedure would be
6 for you to contact Mr. Berman or someone else
7 involved in the case and ask for assistance,
8 rather than bring this up for the first time at
9 a deposition.

10 MR. FORT: Sir, I wish you did a little
11 more of your homework. We did do that with the
12 docket clerk. They couldn't find this document
13 either that we were looking for.

14 I don't think -- maybe the docket
15 clerk doesn't understand it. I don't think the
16 docket clerk necessarily has to bother Mr.
17 Boice ever time he can't find a document. If
18 Mr. Mr. Boice can find then there is something
19 wrong our eyesight.

20 MR. TENENBAUM: If you have a problem with
21 the docket clerk's response and I think that
22 you know Mr. Berman and other myself are
23 involved in the case, then you should elevate
24 the issue and ask for assistance in finding it.

1 MR. FORT: Frankly, sir, I thought it was
2 your index, not our eyesight.

3 If something you represent in your
4 index is there and is not there, I think that
5 is something incumbent upon the agency. I
6 don't think we have to make sure that your
7 docket clerk properly informs his own her
8 supervisor.

9 MR. TENENBAUM: If you have a problem in
10 finding something in the record --

11 MR. FORT: Mr. Tenenbaum, I would like Mr.
12 Boice to be able to concentrate on his
13 research.

14 MR. TENENBAUM: After I am done he can
15 continue. He can look it up while we are
16 talking.

17 I think the better procedure and
18 rather than taking all of these attorneys' time
19 for something like this, is for you to give one
20 of us a call and write us a letter.

21 MR. FORT: Until we had a certified index
22 we didn't know that you hadn't corrected it,
23 frankly.

24 MR. TENENBAUM: You have had copies of the

1 certified index that you are asking this
2 question about.

3 MR. KARAGANIS: I have not received it for
4 American Can. I checked with my office. I
5 haven't received it today.

6 MR. TENENBAUM: You have had -- the only
7 change in the index, you have been supplied
8 copies of various indices. The only thing that
9 you may not have had at earlier dates is update
10 number 4.

11 MR. KARAGANIS: I didn't know what index
12 was for what decision and what record for what
13 administrative decision, until we took the
14 deposition of this witness today.

15 BY MR. FORT:

16 Q. Mr. Boice, have you found the document
17 38?

18 A. Yes.

19 Q. Does document 38 correspond to the
20 description of what is supposed to be document
21 38 in the certified index, page number 4 for
22 the Midco II update?

23 A. This is Midco II? I am sorry about
24 that.

1 O. Mr. Boice, have you been able to look
2 for this document 39?

3 A. Yes.

4 O. Have you found a document 39?

5 A. No, not the same one.

6 Q. What is the document 38 in the
7 certified record; it is a document dated August
8 25, 1988 from EPM North Central to you,
9 correct?

10 A. Correct.

11 O. And that is not what is supposed to be
12 document 38 according to the index, correct?

13 A. That's correct.

14 O. And instead that should be document
15 39; is that right?

16 A. That's right.

17 Q. Okay.

18 Now, would you turn for me and find
19 document 46 in this index. There is supposed
20 to be a document 46 being a memo from Mr. Homer
21 of PRC to you.

22 There is a document 45 that matches
23 the description of what is on the index as
24 document 46, correct?

1 A. That's right.

2 Q. Okay.

3 Now is there a document number 46?

4 A. There is none marked 46.

5 Q. All right.

6 There is a document 47, which matches
7 the description, correct, of document 47 in the
8 index?

9 MR. KEATING: Did he say there was no 46?

10 MR. FORT: There was no 46.

11 A. No 46 in the listing.

12 Q. Okay.

13 Now, the document that was supposed to
14 be numbered 33 is from you to Dr. Ball of ERM,
15 correct?

16 A. That's right.

17 Q. And the date of that was supposed to
18 be July 27, '89?

19 A. Correct.

20 Q. Okay.

21 What would have been in that document,
22 what would be in that document, 43 pages of
23 text?

24 A. It would have been comments on the

1 Midco II draft feasibility study, which was
2 sent to Roy Ball and also to the Midco
3 trustees.

4 Q. These would have stated your views or
5 the agency's views concerning the draft
6 document that was mentioned there?

7 A. Yes.

8 Q. Are the items listed in the index
9 reasonably accurate descriptions of the
10 contents of the documents that they correspond
11 to?

12 MR. TENENBAUM: Objection. Instruct the
13 witness not to answer.

14 He is not here to testify about the
15 compilation of the record.

16 BY MR. FORT:

17 Q. I just asked him the question about
18 what was included in this missing document
19 number 38. And he was able to tell me what was
20 included in it.

21 And my question is whether or not --

22 And I assume, is that because you know
23 the document and you wrote it?

24 A. Because it is stated in the index.

1 Q. And you remember writing a document to
2 Dr. Ball on about that time on approximately
3 that subject?

4 MP. TENENBAUM: Same continuing objection.

5 A. It is in the index. I remember it
6 from the index.

7 BY MR. FORT:

8 Q. Did you review the index to assure
9 that it was reasonably accurate?

10 MR. TENENBAUM: I am going to object and
11 direct the witness not to answer.

12 MR. KEATING: As to whether it is accurate?

13 MR. TENENBAUM: Mr. Keating, it is
14 certified for the record that it is accurate.

15 MR. FORT: I have made a showing it was
16 completely inaccurate. How can you say that,
17 counsel?

18 MR. KEATING: More than that, you can test
19 somebody's voracity or their accuracy on a
20 deposition. That is what it is for.

21 I mean, if he says, if he asks him if
22 it is accurate, that is a good question, not a
23 hard one.

24 MR. TENENBAUM: Subject to my continuing

1 objection, if he wants to ask a question about
2 a specific document where you have some problem
3 with it.

4 In the interest of saving time, I am
5 allowing him to answer subject to my
6 objections.

7 If he wants to ask questions about the
8 compilation of the record, there has been no
9 showing made for that.

10 You point to isolated problems in the
11 record. We will be glad to solve whatever your
12 problem is with respect to those isolated
13 instances you point out.

14 MR. FORT: Mr. Tenenbaum, I don't think we
15 have a situation of isolated instances. We
16 have begun to test the certification. And we
17 have just talked about one document that
18 doesn't exist, where it is supposed to exist.
19 And mislabeling of things.

20 I would like to ask Mr. Boice who was
21 responsible for making sure that the index was
22 accurate.

23 MR. TENENBAUM: If you want to ask him
24 about those specific items.

1 MR. FORT: No.

2 O. Who was responsible for making sure
3 the index was accurate?

4 You can answer the question.

5 MR. TENENBAUM: Let me take a second, I
6 will confer here.

7 MR. FORT: No. Either an objection or not.

8 MR. TENENBAUM: It is either an objection
9 or instruction not to answer. I am going to
10 have to take a moment to review it with counsel
11 for EPA.

12 MR. KEATING: Let the record reflect that
13 they are whispering close.

14 MR. TENENBAUM: Is there something in the
15 record? I didn't catch it. Was it supposed to
16 be on the record or was it just a joke?

17 MR. FORT: It was a joke.

18 MR. BERMAN: Would you repeat the question,
19 please.

20 MR. FORT: Read it back, please.

21 (The record was read.)

22 MR. BERMAN: That he can answer.

23 MR. TENENBAUM: I am going to allow him to
24 answer that question, subject to my continuing

1 objection.

2 But, I would point out that there is
3 an ambiguity in your question as to whether you
4 are referring to just the index or whether you
5 are referring to the comparison or
6 inter-relationship between the index and this
7 box.

8 MR. FORT: I assume that the box which
9 contains the record is intended to be related
10 to the index, otherwise the index is not much
11 good if it has no relationship to the record,
12 so it is the latter.

13 I think the witness understands that.

14 Q. But, can you answer the question?

15 A. I think the US Environmental
16 Protection Agency has the overall
17 responsibility.

18 Q. Okay.

19 Is there an individual within the
20 United States Environmental Protection Agency,
21 the 10,000 employees or whatever, who was
22 responsible for this index being accurate?

23 A. You mean the documents in the index?

24 Q. No. The index being accurate in terms

1 of the numbering used in the index in relation
2 to what is in the box.

3 MR. BERMAN: That is a different question.

4 MR. TENENBAUM: He can answer that
5 question.

6 MR. FORT: Fine.

7 MR. TENENBAUM: You can answer the question
8 the best you can.

9 A. I was largely responsible for the
10 index.

11 BY MR. FORT:

12 Q. Did you write it down and then have
13 somebody type it up?

14 A. I think -- aren't we getting into the
15 same issues you objected to before?

16 Q. Your lawyer is very capable, Mr.
17 Boice. If he wants you not to answer it, he
18 will tell you.

19 So would you --

20 MR. TENENBAUM: You have gone on to another
21 question. It is perfectly legitimate for us to
22 evaluate this question by question.

23 MR. SHELDON: Mr. Court Reporter, is there
24 a question pending?

1 MR. FORT: Yes, there is a question
2 pending. I am waiting for an objection.

3 MR. SHELDON: I would just note it is 5:35
4 p.m.

5 BY MR. FORT:

6 Q. Mr. Boice, would you answer the
7 question, or, Mr. Tenenbaum, would you object
8 so we can move along?

9 MR. KEATING: Don't object. Fool him.

10 MR. BERMAN: Will you repeat the question?

11 (The record was read.)

12 MR. TENENBAUM: I am going to object and
13 direct him not to answer on the ground that you
14 are asking about how he compiled the record.

15 If you want to ask as to whether he
16 certified it, I will allowed you subject to my
17 object to answer.

18 But, as to the process of compilation
19 of the index, I don't think that --

20 BY MR. FORT:

21 Q. Mr. Boice, you said you were largely
22 responsible for the index. Is anybody else
23 responsible besides you?

24 A. Do you want to get into the whole

1 procedure or do you want to just --

2 MR. TENENBAUM: We really don't have any
3 basis for you to be asking questions on the
4 entire procedure of certification.

5 MR. FORT: You don't have to have a basis
6 for me to ask a question. If you have an
7 objection, you have an objection.

8 You said you would allow an answer
9 that he was largely responsible. I am trying
10 to clarify what he meant by largely
11 responsible.

12 Q. Can you clarify what you meant by
13 largely responsible?

14 MR. TENENBAUM: If you want him to tell you
15 generally speaking.

16 MR. FORT: Is that an objection or is this
17 just --

18 MR. TENENBAUM: Yes, it is an objection.

19 MR. FORT: Duly noted.

20 Q. Can you answer the question?

21 What did you mean by the phrase
22 largely responsible?

23 MR. TENENBAUM: Subject to my continuing
24 objection, I am going to allow him to answer

1 generally as to what his general responsibility
2 was.

3 But, if you are going to try to probe
4 it any further, I am going to direct him not to
5 answer.

6 MR. FORT: That wasn't my question.

7 I am asking what did he mean when he
8 used the word largely responsible.

9 MR. TENENBAUM: I told you that I will
10 allow him to answer to the extent that he is
11 able to testify as to largely what his
12 responsibilities were in this connection,
13 subject to my continuing objection.

14 A. My responsibilities were to review the
15 index and make sure it contained everything
16 that we wanted to put in the index.

17 MR. FORT: I have one more question for
18 today on this index.

19 Q. Directing your attention to index
20 number 4, page number 1, on Exhibit No. 3.

21 A. For I or II?

22 Q. It is a combined update. It is
23 entitled, "Administrative record sampling data
24 index number 4, Midco I and Midco II Superfund

1 site. Documents not copied but may be
2 reviewed."

3 Page number 1 is what is listed, about
4 the fifth page back perhaps. Do you see that
5 page now?

6 A. Yes.

7 Q. What is the date on those, I don't
8 understand the date?

9 MR. TENENBAUM: Which date?

10 MR. FORT: The date for the first item.
11 Date of validation worksheets, author USEPA.

12 A. I don't understand it either.

13 Q. You didn't prepare this page?

14 A. No.

15 Q. Okay.

16 What is the next item which are
17 discharge monitoring reports from the City of
18 Gary for April, May and June of '89?

19 A. Those are discharge monitoring reports
20 from the City of Gary, East Chicago and Hammond
21 wastewater treatment plant.

22 Q. These documents are not in the record
23 at all, right?

24 MR. TENENBAUM: Excuse me.

1 A. They are in the index, they are
2 referenced in the index.

3 BY MR. FORT:

4 Q. Put to see those documents you have to
5 make arrangements with the water division?

6 A. That's right.

7 Q. Okay.

8 Do you know when the discharge
9 monitoring report for June 1989 was prepared?

10 A. No.

11 Q. It would have been sometime after June
12 30 of 1989, correct?

13 A. I guess so.

14 MR. FORT: Okay.

15 I think we ought to stop today. We
16 have several outstanding requests. Mr. Sheldon
17 has his request for the documents that were
18 listed in his notice of deposition for Mr.
19 Boice.

20 And maybe, Harvey, do you want to make
21 a specific statement about it asking for that?

22 MR. SHELDON: I think it is time to adjourn
23 since it is almost six o'clock.

24 And I understand that the government

1 has requested to transport all these documents
2 back to the government, which I have arranged a
3 messenger who has been standing by for almost
4 and hour to do that.

5 The request I guess I would have is
6 twofold. First of all, that the government
7 come back with all the documents that it has
8 produced today in the same boxes.

9 Second, that the government, if it
10 feels that there are documents that are outside
11 of these boxes and not present today, that
12 should be produced pursuant to either Standard
13 T's notice or, for that matter, the notice of
14 any party, that those also be produced.

15 Standard T's notice was under Rules 30
16 and 34, and respectfully requested all
17 documents in Plaintiff's possession, custody or
18 control relating or referring to Plaintiff's
19 selection of remedial action activities at the
20 Midco I and Midco II sites in Gary, Indiana,
21 including but not limited to documents
22 comprising, relating, or referring to any item
23 in a list which includes such of those items as
24 we had at that time of this notice. That goes

1 back to November of 1989.

2 We want in short all of the documents
3 that relate to Midco, but those in the record
4 and those which relate to Midco that you have
5 decided not to put in the record that you have
6 in your possession or control, and I ask that
7 they be brought back tomorrow.

8 MR. TENENBAUM: We have indicated our
9 position on that in our filing of our
10 objections and response, and to the extent that
11 we are not objecting we will endeavor to bring
12 the documents.

13 MR. FORT: I think we ought to be clear.

14 MR. SHELDON: If you believe there are
15 documents that are subject to a privilege, you
16 may identify those privileges and proceed in
17 accordance with the federal rules.

18 But, your belated objection at this
19 point, I would refer again to the comments made
20 at the outset of this deposition by Mr.
21 Karaganis, and his citation to you of authority
22 to the effect that absent a claim of privilege,
23 it is improper for counsel at a deposition to
24 instruct the client not to answer.

1 If you object to a question you should
2 state your objection on the record and allow
3 the question to be answered.

4 And if you have a claim of privilege,
5 sir, I would ask that that privilege be
6 identified, the nature of the privilege be
7 identified, and the nature of the documents
8 that are subject to the privilege be
9 identified.

10 Had that been done, we would have
11 avoided some discovery today, because there
12 were documents obviously you claimed the
13 privilege to that go far beyond the scope of
14 simple lawyer work product, but get into actual
15 evidentiary material.

16 MR. FORT: What time are we going to resume
17 in the morning.

18 9:00 o'clock. Are you going to be
19 ready at 9?

20 MR. TENENBAUM: For the record, we have
21 already responded to the statements that were
22 made earlier today about objections and
23 privileges and so on.

24 I won't go through them ad nauseam

1 here at this time.

2 MR. FORT: What time are you going to be
3 back?

4 We still have questions on these
5 documents. So what time will we be back and
6 what time, and what arrangements do you need to
7 have to get these documents back over here?

8 MR. TENENBAUM: Are we off the record?

9

10

11

(Whereupon the deposition

12

was continued to June 6,

13

1990 at 9:30 o'clock a.m.)

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